

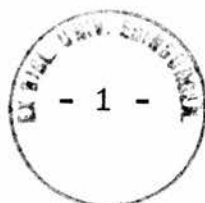
**MARRIAGE , PROPERTY AND LAW :
AN UNEASY ALLIANCE**

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I certify that this thesis consists solely of my own original work and that all of the sources upon which I have drawn have been identified.

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"With this ring I wed you.

This gold and silver I give you, tokens of all my worldly goods."

.....The Nuptial Mass

"The private, regarded in legal ideology as unsuitable for legal regulation, is ordered according to an ideology of love."

.....K.O'Donovan, Sexual Divisions in Law

"What a silly thing love is! ... it is always ... making one believe things that are not true."

.....Oscar Wilde

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ABSTRACT

The aim of this thesis is a study of relations between marriage, property and law. It looks at the legal relationship of marriage, the form and nature of matrimonial property and the rules of Scots law as they apply to the property of husband and wife.

The study falls into three parts. In Part I there are three histories. Historical changes in Scots law, in marriage and in property are traced through the accounts of legal and philosophical writers and through the historical account of marriage presented by L.Stone in The Family, Sex and Marriage in England 1500-1800. Part I presents isolated historical accounts of change in each of the three elements of law, marriage and property.

In Part II, the patterns of change that emerge from these histories are questioned. It is argued that presentations of change in isolation may create an image or perception of change which can give rise to unfulfilled expectations. The term "image" is intended to convey the possibility of illusion, a false or misleading picture. The dominant image of change has three characteristics: the disappearance of property from marriage and its replacement with affect, an increasing emphasis on privacy and a split from the public and an increasing emphasis on individualism rather than community. These trends can be discovered in the historical

accounts of each of the elements of marriage, property and law.

In Part III these emerging images of change are used to analyse specific points of interaction between marriage, property and law.

The aim of this study is to consider how an image has arisen of marriage and its relations with property and law, to assess what contribution this image has made to the confusion which seems to surround the relations between marriage, property and law and to explore how this confusion is reflected in Scots law.

CHAPTER 1: MARRIAGE, PROPERTY AND LAW: AN INTRODUCTION

"With this ring I thee wed...with all my wordly goods I thee endow."

It is this conjunction of marriage and property that inspired my interest to write the following thesis. Dual themes of love and money, fundamental legal relationships of marriage and ownership, are apparently entwined. Dominant views of marriage and property suggest conflict and division between these two elements¹ and so, as a student of law, I wanted to discover how they were contained within terms of legal regulation. How does law accommodate the co-existence of marriage and property? There are therefore three strands to my study - the relationship of marriage, the property of husband and wife and their regulation by law.

The subjects of my study are marriage, property (matrimonial) and their legal regulation. What is proposed is not a full scale analysis of each of these elements but a look at some of their points of interaction. I do not intend to produce a comprehensive theory of their relations but to investigate aspects of them.

As a starting point, it seemed to me that once upon a time there was a very clear relationship between marriage, property and law. Legal and social histories explain that for landowning families of the past, marriage had a lot to

do with property and the law regulated it accordingly. Property was a recognised element of marriage and regulation of it was incorporated in the law of husband and wife. Among those families that owned property, only the foolish or the unfortunate would enter into marriage without a carefully negotiated marriage settlement to take care of their property. In more recent times, it seems that romance may have clouded the ties between marriage and property, leaving it to the divorce lawyers to remind the spouses how closely linked were their emotions and their assets. A split seems to have developed between the personal relationship of marriage and the commercial matter of property. There was I thought some confusion, in legal regulation, in social ideals and in popular beliefs about relations between marriage, property and law. I was interested to consider this confusion and to trace its development.

To consider this confusion by means of a coherent structure it was necessary to set some limits. I did not want to create grand theories of developments in marriage, property and law. I wanted to be able to pick out those aspects that interested me; those aspects which seemed to contribute to confusions and contradictions. The scope of the study is not, therefore, consistent but there are certain limits within which I have tried to abide.

Marriage

The personal relationship on which I have focused is that within the legal status of marriage. Methods of entering into this relationship in Scotland have changed within the period with which I am interested. Prior to 1940, wedlock in Scotland could be entered into by regular or irregular marriage. The irregular forms of marriage created by declaration de praesenti and by promise subsequente copula have been abolished² and the remaining irregular form created by cohabitation with habit and repute is little used and its continued existence is under threat.³ The legal relationship of marriage in Scotland is therefore almost entirely the product of regular marriage as now governed by the Marriage (Scotland) Act 1977. Although there have been changes in the rules regulating entry into marriage, legal recognition of this status has remained consistent. Despite reports of a growth in cohabitation, it has attracted little legal recognition and for that reason I will also ignore it.⁴ I will concentrate therefore on marriage as recognised by the current legal rules.

Reference may be made to families but my primary concern is with husband and wife. The term family may be used to describe the nuclear unit founded on marriage. Although this might include issue of the couple, children have little part to play in this study. The relations between parent and child and the links between children and family property merit a distinct consideration and in my opinion

should not be subsumed within a study of husband and wife. There may be some discussion of children in relation to changing roles of husband and wife and in relation to property. They are, however, for the purposes of this study, incidental to the union of husband and wife. The term "family" will also be used to describe the "extended family"; the wider network of relatives of husband and wife.

Not all marriages are of interest to me. This is a study of marriage and property and so I only want to look at marriages that involve some element of property. It is not possible to restrict the scope to a fixed social class. At various historical stages, different types of property have been relevant to a changing range of families. When land was the most important type of property then only marriage within the upper classes was likely to involve any significant amount of property. The growth in importance of income, of moveable property and, in recent times, the expansion of domestic goods have contributed to the spread of ownership within a much wider range of social classes. Thus the scope of my study will alter depending on the nature of matrimonial property.

In recent times most discussion, and most legal reform, of marriage and property have concentrated on what happens when a marriage breaks down. It seems that so long as an equitable financial settlement is reached on divorce, there is no need to investigate what goes on within the

marriage. The Scottish Law Commission in its most recent consideration of matrimonial property concluded that provided a legal mechanism was available for fair sharing of property on divorce there was no need to interfere with the separation of property during marriage.⁵ What I want to discuss however is not divorce and property, but marriage and property.⁶ It might be argued that such concern is of no practical value but it is, I would reply, of immense academic interest. It is interesting to consider why the economic realities of the relationship should be postponed until the relationship has broken down.

The relationship of marriage will therefore be considered within these limits. My concern is with the legal relationship of marriage; it is with the marriage relationship of those who own property and it is with the currency of the relationship.

Law

Some of the limits which I have set in terms of studying marriage have been guided by the scope of the existing law. The legally recognised relationship of marriage, for example, has been preferred to cohabitation. Perhaps the scope of my interest in the element of law is the simplest to define - located as it is in tangible form in statutes and case reports. The law with which I am concerned is Scots law as it has regulated the property of husband and

wife. I will look at the common law system as it governed matrimonial property, at the changes introduced by the reforming legislation of the late 19th and early 20th centuries and finally at more recent developments within the Matrimonial Homes (Family Protection) (Scotland) Act 1981 and the Family Law (Scotland) Act 1985. At the centre of this legal pattern of regulation is the apparent turning point of the Married Women's Property reform legislation.⁷

Property

What of property? Again this is a subject too wide to pass without some limitation. My main concern is with property that is relevant to marriage.

Prior to the property reforms of the late 19th and early 20th centuries, it might have been possible to say that I was interested in property which attracted legal regulation as matrimonial property. For a time, however, it looked as if law did not recognise any property as relevant to marriage. With the introduction of separate property, matrimonial property seemed to disappear. It is therefore difficult to define the scope of my interest in property. It is not a fixed category of property; it is a flexible and changing group of assets that is in some way tied, by law or in use, to the act of marriage or to the spouses.

This property might be loosely termed as matrimonial or as the property of husband and wife.⁸ Scots law has tended to describe such property as the property of husband and wife. The terms are perhaps not interchangeable. Matrimonial property seems to fit with the idea of marriage as a combination whereas the property of husband and wife is perhaps more consistent with the view of spouses as individuals. These terms might therefore be used as a way of expressing different concepts of the relationship between property and marriage.

Structure - Histories, Images and Reflections

Within these limits, I want to look at the three elements of law, marriage and property and to consider the relations that exist between them. I want to investigate their interaction and to trace some of the conflicts and confusions that surround their co-existence. My study falls into three parts. I will begin, in Part I, by considering historically each of these three separate elements. I will consider changes in Scots law as it relates to the property of husband and wife, changes in the marriage relationship and changes in property. Historical changes will be traced in each of the three elements of law, marriage and property. What will result is not a meticulous, chronological account but a loosely fitting collection of aspects of the past.

Where shall I find historical accounts of these elements? For my purposes these histories are to be located not in personal empirical study but in the accounts of others. I do not want to discover anew or to rediscover the history and development of marriage, property and law. I do not want to present the truth about them. I want to consider the discoveries of others. In so doing, I intend to look not only at what these elements are or have been but at how they have been presented. Historical accounts of legal reform, marriage and property will contribute to a picture of concrete changes but they will also help to explain how images of the past develop.

There are many accounts of marriage, matrimonial property and the relevant legal reforms. How will I choose? To some extent I have chosen those which I found interesting; those which were the least surprising; those which fit with my assumptions about the past - my misunderstandings of marriage, property and legal regulation. I am aware that for each account I have chosen there are many that speak in contradiction. It is not my purpose to compare and to evaluate the historical facts of these various accounts but rather to make use of a range of histories which seem to contribute to dominant concepts of what happened in the past and what has changed. Changes in terms of legal reform and of property will be presented through the accounts of Scottish legal writers and philosophers of the 18th, 19th and 20th centuries. Changes

in terms of the personal relationship of marriage will be presented through the account of Lawrence Stone.⁹

Part I of this thesis will therefore look at separate accounts of developments within legal reform, marriage and property. It will present historical changes in law, marriage and property gathered from the accounts of others. Part II will look at these developments in conjunction. Having charted developments separately within law, marriage and property in Part I, I will then return, in Part II, to my opening proposition that marriage and property are closely linked - "With this ring ..." I would suggest that there is an enduring connection between property, marriage and law, and I will consider what evidence there is of such a connection within the histories of Part I. Is there a constant link between marriage, property and law? Does this emerge from the three historical accounts that I have presented? Or do the separate histories suggest a break in relations?

In Part II I will re-examine the patterns that emerge from the separate histories of Part I. I will suggest that the historical approach employed by the legal writers and, more particularly, by Stone can produce misleading images of change: images that are exposed by considering the interaction of change in marriage, property and law.

First I will reconsider the apparent disappearance of property from marriage - an image that emerges from the

legal reforms and from Stone's history of marriage. Secondly I will highlight other trends and images that emerge from the separate historical patterns of Part I. I will re-examine the isolated accounts of change within legal reform, marriage and property to consider what images emerge from each. From looking at the presentation of changes in marriage, what images emerge about marriage? In a similar way, what images emerge about matrimonial property, about legal regulation and about the relations between all three. If, as I suggested at the outset, there is confusion about the relations between marriage, property and law, how did this confusion develop? Is it the product of misleading images of how things have changed from the past? Has a dominant image of change within the personal relationship of marriage misled us into a misunderstanding of the connections between marriage and property? I want to consider how presentations of change and changing perceptions of these three aspects have contributed to the emergence of images, characteristics, beliefs of marriage and matrimonial property.

In Part I therefore I will present patterns of change within marriage, law and property. There will be three isolated patterns of change. In Part II I will consider the interaction of these three elements and I will argue that their presentation in isolation has contributed to the emergence of images which characterise marriage, property and law and the relations between them.

In Part III I will use these dominant images of change as tools with which to analyse relations between marriage, property and law. In particular I am interested to discover to what extent these images or characteristics are reflected in the legal regulation of marriage and property, both under the system which operated prior to the Married Women's Property reforms and more recently.

This thesis therefore divides into three parts. In Part I there are three presentations of historical change - in law, in marriage and in property. In Part II there is a critical examination of the presentation of these histories, in particular, the histories of law and marriage. Changes considered in isolation in each of these three elements produce misleading images. In Part III, I will analyse continuing relations between marriage, property and law in the light of these images.

What I do not intend to do is to provide an answer; to criticise what others have done and then to give my own solution. This thesis was not inspired by the desire to change or to solve. There may be defects in the way in which Scots law regulates property in marriage, there may be other systems which do it better. It is not my aim to suggest a new property regime for Scotland. I am interested in considering what relations can be discovered between law, marriage and property but not, primarily, in proposing reform.

The purpose of this thesis was to further my understanding of interaction between marriage, property and law. Its inspiration was simply an interest in some of the confusions, contradictions and seemingly insoluble conflicts that I perceive in marriage, its relations with property and their regulation by law: a fascination with the mixture of nature, common sense, romantic notions, black letter law.¹⁰

NOTES

1 For example, marriage as a relationship based on altruism in conflict with property as a selfish right, or property as a matter of commerce divided from marriage as a matter of romance.

2 Marriage (Scotland) Act 1939, s.5.

3 Scot. Law Com., Discussion Paper 85, Family Law: Pre-consolidation Reforms, March 1990.

4 The Matrimonial Homes (Family Protection)(Scotland) Act 1981 took the legally radical step of recognising cohabitation for the purpose of granting occupancy rights. More recently the Scottish Law Commission has considered the need for greater legal regulation of cohabitation, in Discussion Paper 86, The Effects of Cohabitation in Private Law, May 1990.

5 Scot. Law Com., Consultative Memorandum 57, Matrimonial Property, March 1983.

6 There will be some discussion of how law deals with property on divorce under the Family Law (Scotland) Act 1985 to the extent that such treatment is clearly influenced by what happens during the relationship.

7 Marriage and families are regulated by a diverse body of rules emanating from public law, private law and what might be termed welfare agencies. It is increasingly difficult to define a fixed set of rules as Family Law. While recognising the importance of, for example, taxation and social security law to marital and familial economics, I have chosen to consider only private law.

8 See discussion of Matrimonial Property and Property of Husband and Wife in chapter 4.

9 L.Stone, The Family, Sex and Marriage in England 1500 - 1800. Although in timing and in detail, developments in Scotland may have differed, Scottish histories such as T.Smout, History of the Scottish People and K.Marshall, Virgins and Viragos suggest that the influence of general trends as described by Stone were also present in Scottish society.

10 By using the phrase "black letter law" I am referring to a method of application and study of law which focuses on the written legal rules and excludes consideration of, for example, their social, economic or political setting.

PART I
HISTORICAL CHANGE

PART I

HISTORICAL CHANGE

This thesis is a study of three elements - Scots law, marriage and property and in this Part I will consider separately changes in each of these elements. Part I will, therefore, consist of three histories - a history of legal reform, a history of marriage and a history of property. These histories are not comprehensive chronological accounts but aspects of change. The changes that are presented in each of these three histories are not those which I have discovered through empirical study. They are changes that have been presented by other writers. Discussion in Part I does not take account of legislative developments since 1980.

It is a recurrent theme throughout this thesis that change may be accompanied by a presentation or perception of that change which contributes to an image of change. In suggesting that there is some image of change, I am arguing that there are two levels of change. On one level there is concrete change. On a second level, presentation and interpretation of this change have contributed to an image of change which may be unjustified. This is a theme which will be considered in more depth in Part II but, in Part I, I will begin to discuss and to question the presentation of change.

CHAPTER 2: HISTORY OF LEGAL REFORM

In this study of law, marriage and property I will begin with law. I will look at the law in Scotland as it relates to the regulation of property on marriage and consider the way in which it has developed.¹ The first step in the process of analysing the relations between law and property and marriage is to provide a straightforward account of the specific legal changes: to present the legal developments in Scots law in relation to the property of husband and wife. The last two centuries have produced change, and much documentation of change, in the law of husband and wife. The period of greatest activity in law reform relating to the property of husband and wife has been the late 19th and early 20th centuries and it is on that era that I will concentrate.²

MARITAL UNITY AND COMMUNITY OF GOODS

In considering the law relating to the property of husband and wife there are three distinct phases. First there was the common law; the traditional system which governed, largely unchanged, until the 19th century. Secondly, there were the legislative reforms of the late 19th and early 20th centuries. These reforms gradually refined, modified and ultimately abolished the common law system. It is this process which I will now consider. Finally, there is the modern system, the legal regime which existed after the reforms.³

COMMON LAW

There were two aspects to the regulation of matrimonial property under the common law - the pre-nuptial arrangements relating to the property brought by the two parties to the marriage and the subsequent legal rights of the spouses to their property.⁴ As the law relating to property on death or divorce is largely outwith the scope of this study, so too is the law relating to pre-nuptial negotiations and settlements. Some insight into the legal rules governing matrimonial property may however be gained from consideration of the source of such property. Accordingly it is appropriate to look briefly at property exchange and contributions on the occasion of marriage.

In Scotland, there existed a practice whereby property would be exchanged between the two families on marriage. Provision was made for each spouse to bring some material assets to the union, the nature and quantity of which would vary greatly depending on the economic position of the spouses and their families. This would establish the financial base of the marriage. The general system was that the woman would bring her dowry which was known in Scots law as the tocher.⁵ The tocher would be a sum of money or a collection of assets paid or given over to the husband. It would be provided either by the wife or by her family. In return, the husband made his contribution to the economic union.⁶ In medieval times the husband might make his contribution in the form of a church door gift, giving to

his wife some land or goods on the morning of their wedding. The husband's contribution was sometimes referred to as the donatio propter nuptias.⁷ Later practice was for the husband and wife to be,

"put in joint possession of a piece of land which in Scotland was termed the conjunct fee."⁸

This would represent the husband's contribution to the union and it would usually reflect the size of the wife's tocher. Income from this land would enable the husband to maintain his wife and any children and it could be used to provide an annuity for the wife if she outlived her husband.

The source of matrimonial property was significant in understanding the common law rules relating to ownership and control of matrimonial property. Traditionally matrimonial property would be based on a fund established at the time of marriage and would comprise property that was inherited by or gifted to the spouses. It was common for both spouses and their families to contribute to the financial base of the union. Later, matrimonial property was more likely to be acquired by the spouses in return for labour. There was therefore a shift from a fund of predominantly heritable property, transmitted through a family line, to a collection of heritable and moveable assets, including earned income, which would be acquired through the lifetimes of the spouses. This changing source

and nature of matrimonial property was important in producing the legal reforms.⁹

Equipped with some idea of the property arrangements made on the occasion of marriage, I will now proceed to the law relating to the property of husband and wife during marriage. In Scotland, the common law regulation of property during marriage was in the 19th century very little changed from that of the preceding centuries. It could be summarised simply and briefly in that, on marriage, the property of husband and wife was consolidated automatically into one fund. This fund was to some extent owned¹⁰ by the husband and it was entirely administered by him.

"Immediately upon marriage the husband is by the common law of Scotland invested with what are known as his *jus mariti* and right of administration."¹¹

Under the common law, when a couple married the husband was given two rights. The *jus mariti* related solely to the moveable property of the wife. The *jus administrationis* applied to all of her property, both heritable and moveable.

jus mariti

By virtue of the *jus mariti* the husband was given complete ownership of the moveable property of his wife.¹² This extended to all of her moveable assets, regardless of how

they had been acquired. It applied to all moveable property which the wife might have at the point of entry into marriage and to all moveable property which she might subsequently acquire. Most importantly, the husband's jus mariti gave him ownership of all money which his wife might have, including money which she personally earned.

The husband's right to such property was complete. He was free to use and abuse the property as he wished and it could be attached by any of his creditors.

"He could dispose of it at will, and it was liable for his debts 'to the very last farthing'." ¹³

The wife could claim maintenance from her husband¹⁴ but her claim would rank second to the claims of her husband's creditors.¹⁵ The only other restriction on the husband's disposal of his, or his wife's property, was that on marriage he became liable for all of his wife's ante nuptial debts, so far as they related to her moveable property.¹⁶ The question of post nuptial debts did not arise, as a wife could not become a debtor. As expressed by Braxfield, L.J.C. in 1791, in Harvey v. Chessels, Bell, 258,

"A married woman can grant no personal obligation: such obligation is null and void, because in law a wife has no person."

Two very limited exceptions to the husband's jus mariti existed in the wife's paraphernalia and peculium. By these two devices the wife retained ownership of very specific categories of moveable items. The paraphernalia related to property which formed part of the woman's dowry but over which she was allowed to retain ownership. The types of assets which fell within the description of paraphernalia were extremely restricted. The paraphernalia would include only her clothes, her jewellery and ornaments along with any pieces of furniture or cases required for storing these items. It might be argued that some jewellery did not properly fall within the category of paraphernalia. Jewellery of considerable value might be classified as family jewellery - an heirloom - and therefore as heritable property.¹⁷ Classed as paraphernalia would also be gifts given by the husband to the wife in respect of the marriage. Assets which fell within this narrow category would remain under the sole ownership of the wife.¹⁸

The second exception to the jus mariti - the wife's peculium or "lady's gown" - was a similarly narrow exception. Where a wife survived her husband, she would be entitled to a liferent of one third of her husband's heritable property. This right was known in Scots law as terce.¹⁹

Before the husband could sell land in which the wife had a potential right of terce, he required her consent. If during the marriage the husband did sell such heritage

there was a practice whereby the purchaser might make a gift to the wife, probably of a small sum of money. This gift was known as her peculium or lady's gown and it did not fall under the husband's jus mariti.²⁰ It remained under the ownership of the wife and, along with her paraphernalia, it formed the wife's separate property.

All of the wife's moveable assets, except for her paraphernalia and peculium, were transferred into the ownership of her husband by virtue of his jus mariti.²¹ The goods were transferred automatically, with no need for intimation of assignation.²² The husband's right was very extensive. He had complete ownership and control of the goods and he was free to use and abuse them as he wished.

Right of administration

The second right, the jus administrationis, governed all of the wife's property, both heritable and moveable. It was a right of administration and control. It was significant mainly in respect of heritable property. As already discussed, the jus mariti gave the husband complete ownership, with consequent power of use and disposal, of the wife's moveables. The separate right of administration was therefore of little relevance. The right of administration was important in relation to any moveable property which fell into the wife's separate estate, namely paraphernalia and peculium. Although these categories of

moveable property remained in the ownership of the wife, the husband by virtue of the jus administrationis had the right of control.

Although the jus administrationis did apply to all of the wife's property and, as seen above, it was important in relation to specific types of moveables, it will be discussed mainly in respect of heritable property. The jus administrationis or right of administration applied to all of the wife's property and therefore included any heritage which she owned. It applied to any land or buildings thereon, with any income from such land falling under the jus mariti. Until the 19th century it was this category of property - heritable property - which was by far the more important.²³ For that reason the right of administration, although a lesser legal right than the jus mariti, was of great value.

Perhaps it was in recognition of the greater significance of heritable property that the husband's right to it was more restricted than his right to the moveables. By virtue of the jus administrationis, the husband was not given ownership of his wife's heritable property. The wife herself retained ownership. Her right of ownership, however, was nominal, with the jus administrationis giving to the husband full rights of administration and control. Although the wife was the owner of her heritable property, she could not deal with it or administer it. She was prevented from entering into legally binding agreements in

relation to her property except with the full consent and participation of her husband. While the law stopped short of giving full ownership of the heritable property to the husband, it vested in him all practical powers of dealing with and controlling his wife's assets.

"The right of administration may be defined to be ... not a right of property, but a right of managing property, whereby the husband's consent must be obtained to every act of administration."²⁴

The right of administration, while primarily discussed in relation to heritable property, was in fact an all encompassing right. It gave the husband the power of administration over all of his wife's property. Her moveable property had already passed into his ownership which brought with it the right of administration. The jus administrationis, however, would catch any separate estate which the wife might have - her paraphernalia and peculium. Thus by virtue of the basic, universal right of administration the husband was placed in practical control of all of his wife's assets and given full managerial powers while, in relation to her moveable property, his position was further enhanced by the legal status of ownership.

This remained the position until the late 19th century. The jus mariti and the right of administration took effect automatically on marriage and the property was held to be transferred without any need for intimation of assignation.

Subject to limited exceptions to the jus mariti, which provided some separate estate for the wife, married women had no right to ownership of moveables and no power to administer any of their property.

The defects and anachronisms in this system became obvious long before it was reformed. As an interim measure, marriage contracts provided an important means of protection against the often harsh and undesirable effects of the operation of the jus mariti and the right of administration. Up to the 18th century, marriage contracts had been widely used but their purpose was limited. They were a means of setting out the contributions to be made by both parties to the marriage and they might also be used to regulate the dispersal of property on the dissolution of the marriage. From that time on, however, their purpose changed and widened. It became the practice for marriage contracts to be used to exclude the husband's jus mariti and right of administration. They provided for the reservation of some separate estate for the wife. In this way marriage contracts played an important interim role in helping to modify the common law and bring it closer into line with current thought and need.²⁵

REFORM OF THE COMMON LAW: INCREASINGLY SEPARATE

The 19th century witnessed a great enthusiasm for law reform. Understandably perhaps the male reformers remained

cautious of changes in a legal system which so clearly benefited husbands. In Victorian times, an era of extensive legal reform, it was suggested that although,

"in the law of personal and domestic relations the same spirit of progress has been at work [the reformers] saturated with Roman ideas of patria potestas, lagged further behind public feeling and opinion."²⁶

Legal reform of the law relating to the property of husband and wife was certainly slow in coming and the common law was seen to be vastly out of step with current need. One factor which is argued to have been influential in finally procuring the legislative amendments was the participation of women in paid employment. As both the social and economic position of women continued to change, the calls for the complete removal of the property disqualifications attaching to married women were strengthened. Another important factor was an increase in the extent and importance of moveable property.²⁷ By the late 19th century demands for change of the common law position on a general, positive basis, rather than by permitting individual refinement through the use of marriage contracts, were answered by the legislators. A series of Acts removed from Scots law the legal disabilities which marriage had previously placed upon women. In this process Scotland followed the lead of England, the similarity of their conclusions to a large extent hiding the differences in legal background.

Conjugal Rights (Scotland) Amendment Act 1861

The progress of reform of the common law began in 1861 with the Conjugal Rights (Scotland) Amendment Act. This legislation made two important, if limited, changes to a husband's rights in respect of his wife's property. The first aspect of reform related to the position where the husband had deserted his wife. In that situation, section 1 provided that the wife could petition the Court of Session for a protection order in respect of her property. The protection order would apply to all property which would fall under the jus mariti, and which was either property which the wife acquired by her own industry or property which she inherited or otherwise acquired. In both cases it only applied to property which the wife acquired after she had been deserted. The purpose of the order was to protect such property against the husband or his creditors. If the wife obtained a protection order, all such property would remain in her ownership and would not pass to the husband or be available to his creditors. So long as the order operated, the wife would own the property as if she were unmarried and she would be able to enter into obligations. In other words both the jus mariti and the right of administration would be excluded.²⁸

Section 6 went on to provide for the situation where the wife had obtained a decree of separation. Again the husband's jus mariti would be excluded in respect of all property acquired after the separation and which would otherwise have fallen to him under the jus mariti. His

right of administration would also be excluded and the wife would therefore be able to enter into legal obligations, sue and be sued as if she were unmarried.

Where either a protection order or a decree of separation had been obtained, the wife would remain the owner of this separate property only for so long as husband and wife continued to live apart. If they resumed cohabitation, the husband's jus mariti and right of administration would revive and the wife would once more be unable to take legal action or enter into binding obligations. The only exception was that any property which she had acquired as separate property during the currency of the order would remain as her separate property.²⁹

The second aspect of the legislation was related in that it concerned the husband's obligation to maintain his wife. It highlighted the dual nature of the property system: the obligation of the husband to maintain his wife, having been given ownership and control of her property. Section 16 operated in relation to any property which the wife acquired by succession or gift but not property which she personally earned. The husband's jus mariti and right of administration would be excluded in respect of such property if, having been asked by the wife, he failed to provide reasonable maintenance for her from the property. As with the previous reforms, these restrictions would only operate if the wife's claim was made before the husband gained full and lawful possession of the property.

This provision placed a restriction, however limited and specific, on the husband's right of ownership over his wife's moveable estate. It highlighted the dual nature of the marriage arrangement. It also highlighted the threat to the wife's property posed by her husband's creditors. Section 16 prevented not only the husband from claiming such property but it also protected against the claims of his creditors. Under the common law, the wife's property passed into the control and ownership of the husband but in return the husband was expected to care for and support his wife.

"The law assumed that husbands supported their wives and children and this assumption seemed to justify the legal rule that husbands owned or controlled their wives' property."³⁰

This reform recognised the injustice of the common law where the husband failed to keep his part of the bargain. It highlighted the possible conflict between a husband's duties to his wife and his obligations to his creditors. This reform also recognised the interests of a third party, perhaps the father or other relation of the wife. It might be that the wife's father provided a sum of money which was to be used primarily for the support of the woman. This reform recognised the interest of that third party and his right to some guarantee that his donation would be used in the way he had intended. It offered some assurance that property given to the wife and which would pass to the husband under the jus mariti would first be used to

maintain the wife before it was squandered by the husband or disappeared into the hands of his creditors.

Married Women's Property (Scotland) Act 1877

A more far reaching step was taken by the Married Women's Property (Scotland) Act 1877. Section 3 of this Act stated that,

"The jus mariti and right of administration of the husband shall be excluded from the wages and earnings of any married woman...in any employment, occupation or trade in which she is engaged, or in any business which she carries on under her own name."

It went on to provide that the husband's rights would similarly be excluded from,

"any money or property acquired by her ... through the exercise of any literary, artistic or scientific skill."

These provisions applied only to money or property acquired after the commencement of this Act.

This provision could be seen as an extension of one aspect of the protection granted in the 1861 Act. Under that earlier legislation, the earnings of the woman were retained for her separate use only in the event of her having been deserted by her husband or having obtained a decree of separation. The 1877 Act, however, gave a married woman an unconditional right to the income from her own labour which was in no way dependent on her husband and, as such, was a significant modification of the common law position. Married women now had the right to their own earned income regardless of whether or not they continued to live with and be supported by their husbands.

Section 4 of the 1877 Act, perhaps to redress the balance, made an amendment in favour of the husband. Until this time, a husband became liable for the full extent of his wife's ante nuptial debts. Section 4 provided that, in relation to any marriage concluded after the commencement of the Act, the husband would only be liable for the debts of the wife up to the value of any property which he received from or through her "at, or before, or subsequent to, the marriage."

Married Women's Policies of Assurance (Scotland) Act 1880

A less direct reform was introduced in 1880 by the Married Women's Policies of Assurance (Scotland) Act. At common law, a wife has an insurable interest in the life of her husband and a husband in the life of his wife. The 1880 Act therefore did not create a right for the wife to insure her husband's life. It provided, however, that a married woman could take a policy of assurance on her own life or on the life of her husband and could state that it was for her own separate use. As a result the policy would vest directly in her and all benefits would be paid to her, for her separate use. In this way, the husband's jus mariti and right of administration would be excluded.

A wife's separate estate had previously comprised only her paraphernalia and peculium. Although this property did not fall under the jus mariti, it was still subject to the right of administration. Her separate estate had now been extended to include wages and earnings and the benefits of

any policy of assurance in respect of her own life or the life of her husband. Where a woman had been deserted by her husband, there were certain further exclusions of the jus mariti. In relation to this extended separate estate, the husband's right of administration was also excluded. The quid pro quo was that the wife might be liable to some extent for her own ante nuptial debts.

Married Women's Property (Scotland) Act 1881

By this time there had been significant modifications of the basic common law system through these reforms. The following year, however, saw an end to such circumspect measures and a significant challenge to the husband's position. This came in the form of the Married Women's Property (Scotland) Act 1881. The 1881 Act was a much longer, more detailed and to a certain extent more confused, piece of legislation than the previous reforms. A large part of the confusion arises from the inconsistent exclusion of jus mariti and right of administration. In some aspects both are excluded, in other aspects only the jus mariti is excluded. There is also a distinction in the application of the Act between (a) those marriages contracted after the passing of the Act and (b) those which predated it.³¹

(a) marriages contracted after passing of MWP(S)A 1881

Section 1(1) provided that the jus mariti was excluded from all of the wife's moveable property. Any moveable property,

whether acquired before or during the marriage, would remain as the wife's separate estate.

The husband's right of administration, although usually discussed in relation to heritable property, was an universal right, covering all of the wife's property. The Married Women's Property (Scotland) Act 1881 did not exclude the right of administration in relation to moveable property in general. Therefore, although a married woman now retained ownership of all her moveable property, her husband retained his right of administration over it.

The right of administration was, however, restricted in relation to two specific types of property. Section 1(2) provided that the husband's right of administration would be restricted in respect of income from moveable property. This income was part of the wife's moveable estate and would now form part of her separate property. Section 1(2) provided that the wife could give her own receipt for such property and to this limited extent was able to administer it. She could not, however, proceed to assign it or dispose of it in any way. In order to administer the income in any way other than simply giving receipt for it, the wife required the consent of her husband. Therefore the husband's right of administration was only very slightly restricted.

Section 2 of the Act specifically excluded both the jus mariti and the right of administration from the rents and

produce of any heritable property in Scotland which belonged to the wife. Income from heritable property was classed as moveable property and therefore previously had passed to the husband under the jus mariti. It was now to form part of the wife's separate estate and in addition she was able to deal with it, free from the constraints of the husband's right of administration.³²

In summary, there were three changes to the law relating to marriages entered into after the enactment of the Married Women's Property (Scotland) Act 1881. The wife retained ownership of her moveable property as a result of the exclusion of the husband's jus mariti.³³ She remained subject, however, to the control exerted through the husband's right of administration. The 1881 Act made no general provision to remove the right of administration. She was therefore unable to deal with, or enter into legal obligations concerning, her moveable property even though it now formed part of her separate estate. In general her moveable property was now in the same position as her paraphernalia and peculium. It was her separate estate but she still required the concurrence of her husband in order to administer it.³⁴ The husband's right of administration was however subject to two restrictions. It no longer extended to the giving of receipts for income from the wife's moveable property. A married woman was now legally capable of doing that on her own. The right of administration was completely excluded from rents from any

heritable property which belonged to her and which was situated in Scotland.

(b) marriages contracted prior to MWP(S)A 1881

The provisions relating to this category of marriages were contained in sections 3 and 4 of the Married Women's Property (Scotland) Act 1881. Section 3(1) provided that the husband's jus mariti and right of administration would not be excluded to any extent by the Act if he had executed an irrevocable deed prior to the passing of the Act which made reasonable provision for the wife in the event of her surviving him.

Section 3(2) related to the situation where no such deed had been executed. In that case, the jus mariti and right of administration would be excluded in terms of the Act in respect of any property and income acquired by the wife after the date of the passing of the Act. The Act would apply, therefore, to property acquired subsequent to the Act, on the same terms as it applied to the property of women who married after the passing of the Act.

Finally, section 4 provided that it was open to spouses who married before the passing of the Act to declare in a mutually executed deed that all of the wife's estate would be regulated by the Act. It was, therefore, open to spouses who married before the passing of the Act to agree to be governed by it.

The Married Women's Property (Scotland) Act 1881 was the most radical of the reforms to date. Its main effect was to exclude the husband's jus mariti and preserve the wife's moveable property as her separate estate. Subject to two exceptions, however, the legislation left intact the husband's right of administration. It continued to be the law that in order to enter into any legally binding agreement and to deal with her property a married woman required the consent of her husband.

Married Women's Property (Scotland) Act 1920

The progress of reform, however, was not complete and in 1920 the Married Women's Property (Scotland) Act abolished the right of administration. The traditional common law system of matrimonial property regulation had been finally dismantled. Married women had always had separate ownership of their heritable property, in 1881 they had acquired separate ownership of their moveable property and finally in 1920 they acquired the very important legal capacity to deal with and administer their property and to enter into binding legal agreements in relation to it. Married women were now free to deal independently with their property and they retained all rights and responsibilities in relation to it. This had been achieved through a series of measures, all of which had as their focus either the modification or ultimately the exclusion of the husband's two rights - jus mariti and right of administration. Gradually the separate estate of the wife had been expanded, culminating in the

complete removal of the husband's rights to the property of his wife.

The common law system had been dismantled with the abolition of the jus mariti and the right of administration. The rules which now applied were the result of the dismantling of the old system and not the positive product of a newly created system. Matrimonial property and the ownership of it was now subject to the ordinary rules of property. There was no longer a special regime of matrimonial property law. The intervening years since 1920 have seen the introduction of various measures which relate specifically to the property of husband and wife,³⁵ but the basis of the system which governs such property continues to be that which existed as a result of the reforms of the married women's property legislation.

CHARACTERISTICS OF REFORM

We now have a background picture of the major changes in Scots law relating to the property of husband and wife. These changes form one of the three historical strands which go together to produce the pattern of changing relations between law, marriage (husband and wife) and property. Having set out the basic process of reform, I want to proceed to consider in more detail the characteristics and images of these changes. A simple historical ordering of the reforms may suggest a unified and general process, perhaps with accompanying claims of

progress/improvement.³⁶ This can emerge from looking at the way in which legal writers have presented these reforms, their analysis of the need for reform, the reforms which were made and the implications of these reforms. It is my intention to question this legal presentation of the reforms, to suggest that what the reforms achieved was something different from what the writers emphasised. In questioning their presentation of the reforms, I want to suggest that their presentation nonetheless contributes to an image of marriage, property and law which I would suggest is an important factor in the relations between these three aspects.³⁷ One purpose of considering the changing historical concepts of law, marriage and property is to suggest how various myths and images of the relations between these aspects have emerged or been created. It is the existence of such images or myths which will later be relevant in looking at the way in which law governs property.

There are, I would suggest, various trends which emerge from looking at the legal process of reform of the property laws. I would emphasise two trends that are discernible in legal writing on the reforms - a shift from some form of community property to strict separation of property and a move away from legal regulation of property in marriage. Legal historical accounts of these reforms have tended to deal with them in a broadly similar manner and to place them within a scheme of progress from community to separate individuality. They further characterise the reforms as

signalling a trend from legal regulation to non intervention. While on one level these trends can be seen in the pattern of the reforms, I would argue that some of the accompanying implications or expectations were not fulfilled and to that extent these trends can be treated as images or myths which have contributed to the masking of the relations between law, marriage and property.

COMMUNITY TO SEPARATE

"Nature inculcates the utmost possible identity of interests and community of will between married persons; the husband being lord and master or as it is expressed in Scripture, being 'the head of the wife'; and this natural subordination upon the part of the wife has led to the positive law that in all civil matters having reference to their united means the husband should represent both."³⁸

In this way Fraser, in his Treatise on Husband and Wife, gives expression to a widely held view of the position of husband and wife under common law.

Much legal discussion of the common law rules relating to the property of husband and wife has concentrated on whether or not that system fitted within the concept of a community property system - a communio bonorum. Legal writers, whether accepting or disputing the existence of a communio bonorum in Scotland, have tended to discuss the common law system in terms of community of goods. They have measured and judged its provisions in relation to other contemporary or modern community systems. There has been considerable debate as to whether Scots common law provided

for a communio bonorum, but few writers have discussed the common law rules without introducing the concept of community.

There was no clear statement at common law of a guiding principle in relation to the property of husband and wife. Scots law, in this as in many other areas, has tended to adopt a rather piecemeal approach to regulation. Rather than outlining a basic policy or regime, it dealt with specific situations, providing rights and obligations. It was by using the jus mariti and the right of administration that it brought about a consolidation of the assets of husband and wife. Until the legislative reforms of the 19th century, however, some have argued that Scots law did provide for a communio bonorum.

According to Stair,

"there ^{is} a communion of goods betwixt the married persons."³⁹

Erskine follows, saying that entry to marriage involves

"a communication of ... mutual civil interests ... styled in our law the communion of goods."⁴⁰

Clive writes that by the late 19th century,

"marriage was spoken of as bringing about a communion of goods between the spouses."⁴¹

Although there was a combination of the property of husband and wife by means of the jus mariti and the right of administration, there was considerable doubt as to whether this constituted a system of community property.

"Clearly although it would be misleading to apply any term to this system which would suggest that the wife was an equal or unequal partner in the community of goods during marriage, there were certain community property elements in it. On marriage the spouses' moveable goods merged into one fund, albeit the husband's."42

The debates as to the nature of the Scottish regulation of matrimonial property centred to a large extent on the lack of common rights which were provided to the fund. While there was clearly some combination of property it was not a system that followed the pattern adopted in what were regarded as true community regimes. Fraser compared the system operating in Scotland to what he regarded as a real communio bonorum. The ancient Germans had a real community system which was:

"a partnership proper, - a society to which each of the two associates had an equal right."43

Despite these doubts as to whether or not the Scottish system was one of true community, there was a tendency for it to be discussed in terms of community. When reform was considered, the unacceptable system of property regulation was categorised as a community system and the shift which was brought about by the reforms was described as a shift from community to separate property. In reforming the

common law system in Scotland, all aspects of community in relation to property were rejected.

"The result has been the replacement of a primitive system of community of goods ... by a separate property system."⁴⁴

In summary, the process was presented as a move from a form of community property (however imperfect) to strict separation of property. The suggestion is that by moving from community to separate there was progress.

The use of a community system, however, is not in itself an evil. In many ways community is a notion in keeping with the promoted nature of the marriage relationship, based on sharing and unity. Countries which have adopted a full community system point to the similarity in aim between the sharing in property and the sharing in marriage. The community of property can be regarded as reinforcing the basis of the institution itself. The Canadian Law Reform Commission in its report in 1975 thought of community property that it,

"makes a reality out of the concept of partnership which ... strengthens the institution of marriage."⁴⁵

Categorisation of the unacceptable system as one involving community, to some extent misrepresents its defects and gives unjustified credit to a system based on separation. What were the defects of the common law system? Were the defects not linked to the inequalities of the system rather

than its elements of community? In criticising the common law system, legal writers and reformers tended to focus on the community aspects of the law. They did not deal directly with the inequality. Thus they reformed the law by removing all traces of community, while not specifically dealing with or highlighting inequality. The mischief of the previous system was perhaps wrongly diagnosed as being the element of community and thus the reforms were designed to correct that mischief.

Discussing marriage in the late 19th century, Murray argued that,

"if marriage is in any sense a partnership it can only be of that description which was known amongst Roman jurists as *leonine*. The lion in the fable divided the prey into four shares but devoured all four himself; so the law of Scotland speaks of a *communio bonorum* between husband and wife but gives everything to the husband."⁴⁶

To the extent that the goods of both spouses merged there was common property. What prevented it from being more than a very primitive form of community was the lack of common rights to the fund.⁴⁷

The rights of ownership of moveables and control of all property were not common but vested solely in the husband. What Scots law provided for was the constitution of a single fund, composed of property donated on behalf of both parties to the marriage, but it was not a fund in which both participated equally. The wife (and children) required

to be maintained but otherwise all practical rights of control were given to the husband. It is misleading that the communal aspects should have been confused to some extent with the imbalance of power between husband and wife.

The writers (and reformers?) have misleadingly emphasised the community aspect of the unsatisfactory common law system. While concentrating on community, they failed to focus on the inequalities of the system. This in turn had consequences for the reforms.

It is clear that traditionally spouses were unequal both by law and in practice. The disadvantages of the female position and in particular the position of wife were widespread and the need for reform of the common law was evident. While the reforms did much to remove the greatest injustices of the common law position, I would argue that they also clouded the picture of marriage and its relations with property. Previously the community and inequality imposed by the legal rules had matched well with the accepted view of marriage as the merging of two into one - the husband. Following the reforms the legal rules changed radically. There was now no community and there was legal equality, with both husband and wife subject to the same rules. There was no recognition in the legal rules, however, of the continuing community nature of the marriage relationship. The legal rules took no notice of the personal relationship between husband and wife. The result

of the legislation was to remove legal disqualifications affecting wives as regards property by abolishing the husband's rights to the goods of his spouse. The futility of these changes, however, is summed up by Katherine O'Donovan when she argues that,

"permitting women who have no means of acquiring property to own it is to suggest that they change their philosophy of life from altruism to individualism."⁴⁸

The law itself did not magically create equality. It can be seen as operating a sex neutral policy towards property, but in practice it may in many cases have contributed to the disparity between the economic positions of the spouses. The introduction of a system of separate property seemed to reflect a general swing to individuality and equality.⁴⁹ The split between theory and practice in this situation however is well known. The legal myth of marriage as an equal partnership is contradicted by the unequal bargaining power of the parties when such power is based on property and earning capacity. If the basic marriage contract continues to offer a means of support for those members of society, denied access in practice to employment and property, then its non-interventionist policy will tend to result in inequality and hardship on the breakdown of the relationship. The supremacy of individual ownership is to some extent relaxed during the existence of the relationship, when the dependent spouse is fulfilling her or his part of the bargain, but under a separate property system such non-financial contributions are not regarded as

sufficient to override the rights of ownership on the breakdown of the marriage. The incompatibility of a strict regime of separate property is highlighted when it comes into conflict with the altruism required to satisfy the requirements of marriage. To comply with the emotional aspects the spouses are encouraged to act in common but when the group splits they abruptly revert to being treated as individuals. It should be remembered that discussion of the legal rules in this chapter is historical and does not take account of post 1980 developments in Scots law.⁵⁰

What the legal reforms afforded women was the right to equal treatment as individuals. It did not take account of their promoted roles as wives and mothers. As isolated individuals it granted them theoretical equality but in regulating matrimonial property the law is dealing with members of a group. Evaluation as an individual takes no account of familial obligations or of children or of joint enterprise. The legislative reforms advocated that spouses be treated separately and individually. It continued so to treat them even after they had formed a new, albeit temporary, joint persona. What is fair and equitable treatment of an individual is not necessarily fair and equitable treatment of a partner or ex-partner. There was a confusion of,

"woman's individuality and hence independence from men with the ideology of liberal individualism, the atomised individual."⁵¹

The legislative reform could be regarded as the first step towards equality. Psychologically it was a massive step as it afforded to women the status of legal persons and potential property owners in their own right. It extended to all women the status of unmarried women. Their continued concurrent status as wives renders that step in many cases insufficient. Not only did legislative reform fail to produce practical equality in all marriages but it also weakened the fighting strength of those still disadvantaged. As Carol Smart has argued,

"once legal equality has been achieved, ... it seems politically unreasonable to ask for more."⁵²

It may be very simple to say now that the legal reforms of the late 19th and early 20th centuries never offered equality to husband and wife. What they did was something much more specific and limited. They simply removed two rights which previously had given the husband ownership and control of his wife's property. They gave women legal equality in terms of ownership but the significance of that purely legal equality must be considered in the light of the marriage relationship and of women's access to property. Although the result of the reforms is clear, in purely legal terms, they were surrounded by much expectation and, in legal writing, they have been credited with an equalising power. It became popular to speak of the couple as a partnership and the idea that the spouses were now legally equal in terms of ownership was an important

factor in viewing them as partners.⁵³ It was very easy to confuse the notion of separation of property with equal rights. Yes, the spouses now had equal rights. They each had an equal right to own their own property but they did not have equal rights to each other's property or to a category of matrimonial property. If only one spouse had substantial assets and if only one spouse had access to employment, then their position as property owners was highly unequal.⁵⁴

What separate property actually meant was that being married had no legal effect on property ownership. For the purposes of property, everyone was treated as an individual. The law made no rules in relation to the property of married persons other than those basic rules of property which already existed. This gave weight to the suggestion which will be considered in relation to Lawrence Stone's history of the family, that property was no longer a concern of marriage.⁵⁵ It was also evidence of the second trend which can be seen in the reforms - a move from legal regulation to non-intervention.

AN UNREGULATED RELATIONSHIP

With the completion of the reforms, law appeared to withdraw from the regulation of property through marriage. This was widely regarded as a benefit of the family. It fitted well with liberal thought that there should be a sphere of personal autonomy. It also fitted well with

changing concepts of the marriage relationship, with increased emphasis placed on the isolated nuclear unit and the developing ideal of the family as a private refuge.⁵⁶ As will later be discussed, the privacy and apparent non regulation of the family is neither consistently beneficial nor is it substantiated.⁵⁷ At this stage I would also suggest that to create a sphere of non-regulation was not necessarily the aim of the legislation. The reforms were, however, presented as an example of the closing off of the family from legal intervention.

Of the legislative reform in England, A.V.Dicey said,

"When at last reform became a necessity, the method thereof was determined almost wholly by the existence of the rules of equity."⁵⁸

In a similar way the reforms in Scotland followed the pattern of using a marriage contract. Both equity and marriage contracts had operated by allowing private exclusion of the husband's rights and thereby had created a separate estate for women. The important difference between the use of marriage contracts and the legislation was that the marriage contract removed the husband's rights and also made a private arrangement in relation to the wife's property, whereas the legislation simply removed the husband's rights. Marriage contracts allowed for a private sphere of autonomy but this autonomy from the law was permitted on the understanding that a preferable private arrangement was being made.

In looking for a direction in reform, the already frequent use of marriage contracts provided a lead. Marriage contracts were originally developed as the culmination of financial negotiations preceding marriage. They simply gave formal expression to the economic deal, worked out between the families of the spouses, and laid down the contributions to be made by both parties to the marriage and the scheme of distribution of funds to be applied on the dissolution of the relationship. In their early form they did not permit any alteration of the basic rights afforded to the husband under the jus mariti or the right of administration. As described by Murray,

"the jus mariti was a faculty so inseparable from the character of husband that any reservation thereof by the wife or renunciation by him before the marriage always ran back upon him, as water thrown upon a higher ground doth ever return."⁵⁹

In the mid 18th century, however, it was judicially decided that it was competent to exclude the jus mariti⁶⁰ and the husband's right of administration⁶¹ by means of contract, thus allowing an escape from the increasingly unacceptable effects of the common law. This was not an option which a woman could follow independently. The jus mariti and right of administration had to be renounced with the consent of the husband or excluded by a third party. It therefore became common to use the marriage contract to create a separate estate for the woman, by excluding the husband's rights.

Marriage contracts, however, went still further. For a woman, marriage entailed a passage from the guardianship and support of one man to that of another. Her family, happy to see her entering the most accepted and respectable career of marriage and motherhood, would nonetheless be concerned to guard against the possible failure of the relationship. The marriage contract was a means of creating a form of insurance should the marriage fail to achieve its ideal. On marriage, the relationship envisaged for the couple was that of husband as provider and guardian and wife as housekeeper and mother. In return for the support of his daughter, a father was expected to contribute to the setting up of a marital fund. If a father was so eager to entrust his daughter to the almost complete care and control of another man, was he also willing to entrust a portion of his wealth without some security?

Awareness of the possible shortcomings of the marriage relationship was particularly evident in the development of the use of trusts as part of the marriage contract. The setting up of a trust could be regarded as a way of ensuring that the dependent members of the family unit - under the common law, the wife and children - could be provided for if the husband failed in his duties. The marriage trust commonly set aside a portion of the common fund in which all parties concerned would have some rights. No individual could overcome the rights of the whole unit. So, by excluding the husband's legal rights, a marriage contract could set up for the wife a separate estate. It

could then set up a trust, the object of which was not simply to establish the woman's separate property but to ensure that some portion of the joint fund of both parties was placed beyond their reach, for their future benefit and for the benefit of their dependants.⁶²

In introducing the series of legislative reforms, it could be said that the law was extending to all women some of the benefits which an elite already enjoyed as a result of a carefully considered private marriage contract. The legislation rendered unnecessary the contractual exclusion of the husband's rights. It extended the exclusion previously expressed in marriage contracts to all women. The legislation did not deal, however, with the benefits or possible necessity of some community of assets. Nor did it extend to all wives the benefits of the private trust. The law no longer intervened. It withdrew as it had withdrawn in the past where there had been a private property arrangement. But there was no guarantee that in the majority of marriages there would be any private arrangement. The legislation followed the pattern of marriage contracts in that it removed the two most obvious expressions of inequality and the two most unacceptable examples of legal intervention in the marriage relationship but without full consideration of the system - or the absence of a system - which would remain. The jus mariti and the right of administration were clearly prohibitive of a property relationship suited to the growing notions of equality and partnership within marriage. Their exclusion

was therefore required. But marriage contracts had done more than simply exclude these rights; they had made a private property arrangement to protect the individuals and to further the property interests of the community.

So the legislation did show a move away from legal intervention. But the model for such non-intervention was a system whereby private regulation was substituted. The result of the legislation was to extend a sphere of autonomy to all families but without any guarantee as to how that autonomy would be exercised. The exclusion of the law, which was seen as a benefit under the common law system, was not necessarily a benefit where nothing was put in its place. It was not that property was no longer to be regarded as a legitimate aspect of the marriage relationship but that it was to be regarded as an aspect which should be privately controlled.⁶³ To some extent, the withdrawal of legal regulation was wrongly interpreted as a sign that property was no longer an important aspect of marriage.⁶⁴

The presentation of the reforms as bringing benefits in the form of a switch from community to separate and in a move to legal non-intervention credits them with expectations or implications which they did not fulfil. These images of the reforms, however, are reflected in other presentations of the changing nature of marriage and its relations with property and law.⁶⁵ Although the substance of the images can be questioned they continue to recur frequently in

presentations of marriage and property and contribute to the obscuring of the relations between marriage, property and law.

NOTES

¹ As stated in the Introduction, I will restrict my study to private law; to what is traditionally termed the law of husband and wife.

² Consideration of more recent legal reform, in particular the Matrimonial Homes (Family Protection) (Scotland) Act 1981 and the Family Law (Scotland) Act 1985, will be contained in chapters 7 and 8.

³ Discussion of the modern system will be postponed to chapters 7 and 8.

⁴ There were also common law rules governing the division of property on the breakdown of marriage - originally only on death. These rules are outwith the scope of my study which is primarily concerned with what happens during marriage.

⁵ D.Murray, The Property of Married Persons, pp.88 - 89.

⁶ Recognition of this method of funding the marriage will be relevant in chapter 4 which considers the changing nature of matrimonial property and its relationship to the spouses.

⁷ Craig, Jus Feudale, Vol.II, pp.867-869.

⁸ R.K.Marshall, Virgins and Viragos: A History of Women in Scotland from 1080-1980, p.75.

⁹ Changes in the nature of matrimonial property will be considered more fully in chapters 4 and 5.

¹⁰ By virtue of the jus mariti, ownership of the wife's moveable property passed to the husband. Ownership entailed the power to "sell, or squander, or wastefully destroy" the property - Gowan v. Pursell, 1822 1 S. 418; "to dispose of and use them as he would any property he had acquired by gift or purchase." - Fraser, Husband and Wife, Vol. 1, p.797.

¹¹ Murray, op.cit., p.7.

¹² Some Scottish writers suggested that the jus mariti was a right of administration but it seems clear from the extent of a husband's power and control over his wife's moveable property that it was a right of ownership. Stair said that as a result of the jus mariti the husband, "having the sole and unaccountable administration, his power may rather seem to be a power of property ... yet is no more than" the "economical power of government, the administration ..." - Institutions, I.4.9. Fraser, at p.676, rejected the confusion of the jus mariti with a right of administration. He suggested that the definition of the jus mariti as a mere right of administration developed to fit with the idea of marriage as a

partnership.

13 E.Clive, Husband and Wife, p.295.

14 Murray, op.cit., p.8.

"The husband by the marriage becoming proprietor of all the wife's personal estate ... is bound to provide her in all the necessaries of life." Fraser, op.cit., p.837.

15 Murray, op.cit., p.8.

16 Fraser, op.cit., p.586.

17 Fraser, at p.773, records the notes of Lord Braxfield on this problem:

"Yet valuable jewels different ... they are given to a wife to wear while wife, and then to go to heir; not to be considered as ordinary paraphernalia."

18 Her power to do anything with such items, however, was subject to the husband's right of administration. She could not, for example, enter into a contract of sale in respect of any item of her paraphernalia without the consent of her husband.

19 Originally the right to terce was subject to the requirement that the marriage must have lasted for at least a year and a day or alternatively a child must have been born and heard to cry - ie., a living child.

20 The idea was that she might use this money to buy a dress.

21 Also excluded from the jus mariti were any provisions in favour of the wife which were alimentary in nature. Such provisions were regarded as "so peculiarly personal" to the wife that they "cannot properly be assigned." Fraser, op.cit., p.764.

22 Stair, Institutions, I.4.9.

23 See chapter 4.

24 Fraser, op.cit., p.796.

25 The development of marriage contracts will be discussed more fully later in this chapter and in chapter 8.

26 W.C. Smith, "Scots Law in the Victorian Era" (1901) 13 J.R. 152, at p.156.

27 Changes in property and in particular the rising importance of income and moveables are discussed in chapter 4.

28 ss.1 - 5.

29 ss.3 and 6.

- 30 L.Holcombe, Wives and Property, p. 35.
- 31 The Act received Royal Assent on 18 July 1881 and it came into effect on that day.
- 32 Section 1(3) protected the wife's property against arrestment or other diligence in respect of her husband's debts, provided that it was kept separate from his property.
- 33 The exclusion of the husband's jus mariti resulted in a change in the law of succession. A wife already had a right to share in the moveable estate of her husband if she survived him - jus relictæ. Previously no similar right needed to be given to the husband who outlived his wife because he already had ownership of her moveable property. With the exclusion of the jus mariti, however, section 6 gave the husband an identical right - jus relictæ - to a share in the moveable estate of his wife, if she predeceased him.
- 34 Reforms relating to a married woman's earnings, as previously discussed, excluded both jus mariti and the right of administration.
- 35 Some of these will be discussed in chapters 7 and 8.
- 36 For example, A.D.M. Forte discussing changes in marriage and property in Scotland:
"The present century has witnessed an almost continuous improvement in the legal condition of women in Scotland."
"Some Aspects of the Law of Marriage in Scotland: 1500 - 1700," in E.M.Craik, Marriage and Property, p.104.
- 37 The significance of images emerging from historical presentations of legal reform will be discussed in Part II.
- 38 Fraser, op.cit., p.509.
- 39 Institutions, I.4.9.
- 40 Principles, I.6.12.
- 41 Clive, Husband and Wife, p.296.
- 42 Clive, op.cit., p.295.
- 43 Fraser, op.cit., p.651.
- 44 Scot. Law Com., Consultative Memorandum 57, Matrimonial Property, 1983, p.5.
- 45 Quoted in Hoggett and Pearl, The Family, Law and Society, p.115.
- 46 Murray, The Property of Married Persons, p.1.
- 47 Prior to the reforms it might be argued that the wife's

right to share in the common fund was suspended until the death of her husband. Fraser v. Walker, 1872 10 M. 837, at p.847. For discussion of the postponement of community until death, see Fraser, at p.672.

48 Sexual Divisions in Law, p.194.

49 The significance of a trend towards individualism will be examined in chapter 8.

50 Modifications of the extreme separate property system, in particular, resulting from the Family Law (Scotland) Act 1985 are discussed in Part III.

51 Z.Eisenstein, in A.Phillips (ed.), Feminism and Equality, p.83.

52 C.Smart, The Ties That Bind, p.30.

53 The concept of marriage as a partnership will be considered in chapter 8.

54 Relations between marriage and property are complicated by a (perceived) split between public and private which will be examined in chapter 7.

55 Chapters 3 and 4.

56 See discussion of L.Stone in chapter 3.

57 Chapters 7 and 8.

58 A.V.Dicey, Law and Public Opinion in England, p.387.

59 Murray, op.cit., p.19, discussing the opinion of Stair at I.4.9.

60 Walker v. Creditors of her Husband, 1730 M. 5841.

61 Trustees of Murray v. Dalrymple, 1745 M. 5842.

62 For further discussion of marriage contracts and the use of trust see chapter 8.

63 The absence of private control is discussed in chapter 8.

64 This is an interpretation which will find support in my arguments about Stone's discussion of the changing nature of marriage: chapter 3.

65 Chapters 3 and 4.

CHAPTER 3: HISTORY OF MARRIAGE

In considering the changing law relating to matrimonial property, there were suggestions that behind the reforms lay a changing pattern of familial and marital relations.¹ Such a connection between the form of the marriage relationship and the property laws could be seen clearly under the common law. There the combination of property and the vesting of control in the husband fitted closely with the doctrine of spousal unity and the position of the husband as representative of the marital community.

"The view that the husband was 'the natural head of the family' for centuries determined Scots law's approach to the property consequences of marriage."²

Under the common law there was, therefore, a clear link between the promoted marriage relationship and the rules that governed the property of husband and wife. Much legal regulation seems to be informed by a conception of an ideal type family - an image of the family. It may be that this is an image which is influenced by or is represented in historical studies of marriage and family. I propose now, therefore, to trace some developments in the marriage relationship.

With legal reform, the reforms themselves provide an historical basis, followed by their representation by legal writers. With the history of the marriage relationship,

there are only representations. I will begin, therefore, with an historical representation of changing marital and familial relations. There is no shortage of historical accounts of marriage and families from which to choose. It is a subject which has attracted a wealth of social and historical analysis. It is outwith the scope of this study to evaluate the historical facts of these various accounts and I do not intend to compare their merits or to question their findings on the basis of empirical study. My concern is not with tracing anew the historical development or transformation of family structure and form. My concern is not to discover for myself the truth about marriage and families: the historical facts of their development. Instead it is to present the true facts as exposed by others.³

I have chosen to concentrate in particular on the historical account presented by Lawrence Stone in The Family, Sex and Marriage in England 1500 - 1800.⁴

In choosing Stone I am not primarily singling him out for praise or criticism. I have chosen him for a variety of reasons. Stone's account is detailed, it is wide ranging and it is a good example of a family centred history. It is, therefore, well suited to my purposes as I want to look at the presentation of marriage in isolation. His book I would suggest contains relatively few surprises. It fits well with my impressions, my uncritical beliefs about how marriage and families have changed. The progress in

marriage that Stone recounts is largely consistent with dominant perceptions of modern familial relations. Stone's

"picture of the past is just what one expects to find."⁵

Stone's conclusions find some support in the work of other writers on the family. His emphasis on the move to an isolated conjugal family which has less to do with economic functions and more to do with socialisation finds support in, for example, the work of Talcott Parsons.⁶ Stone's sentiment based method is similar to that adopted by P. Aries in his study of childhood.⁷ In addition, the history that Stone presents displays various similarities to the apparent pattern of the legal reform of matrimonial property.⁸ For these reasons also I have chosen it. In the absence of my own historical study of family and marriage, I will therefore use Stone's. His clear and detailed account of developments in families and marriage will provide a basis for looking at the history of marriage.⁹ Having set out the pattern of developments which he describes I would then go on to consider, in more detail, the conclusions that he produces; the trends that emerge.

Open Lineage Family

The basic pattern that Stone describes shows a progression from an open and extended family, through a patriarchal and increasingly nuclear family to the closed, domesticated, nuclear family. He begins his history with the Open Lineage

Family which was typical of the late medieval era. It was a family type which was very "open to external influences" and which displayed,

"a porosity that is in contrast to the more sealed off and private nuclear family type that was to develop in the seventeenth and eighteenth centuries."¹⁰

The married couple and their children were only very loosely distinguished from their wider family and kin. Many of the functions that would later be performed within the nuclear unit were instead carried out by an extensive network of kinsfolk. The extended family, as described by Stone, was not necessarily a family that lived together under one roof. What bound the family and the kinship together were ties of interest, property and common support. The concern of the open lineage family was,

"the preservation, increase and transmission through inheritance and marriage of the property and status of the lineage."¹¹

According to Stone these ties and, in particular, concern for the safe preservation of property were of varying importance depending on the rank and status of the family concerned. Among the families of the landowning elite, there was intense concern over property and preservation of lineage.

Stone argues that each marriage based family unit of this age could not be considered in isolation, because it was so

closely connected with the wider network of relatives and kin.¹² In the arranging of marriages there was considerable kin involvement, as a consequence of their property interests. Even within the household there were often no clear boundaries between the nuclear unit and the servants, apprentices and other relatives who might be resident with them. Among the poorer classes there was less reason for kin to interfere in relation to property. Stone argues, however, that even in those families there was considerable outside interference and the ties between the members of the nuclear unit were weak. Whereas, among the propertied classes, economic interests were shared throughout the family group, among the peasant classes, economic interests were to a certain extent shared throughout the community. This concern of the extended family or the village was particularly evident in relation to the process of spouse selection. There was strong control exerted by parents or by the requirements of the community over the choice of husband or wife.

In this extended open lineage family there was, according to Stone, little concern for individual personality. This seemed to be the product of various factors. The personality of the spouses was not highlighted because the personal or emotional side of the marriage was secondary to the interests of property, status and kinship. Marriage for interest or for status was, according to Stone, the norm and property was a legitimate concern in the contracting of a marriage. The personal nature of the chosen spouse was

not of primary importance. There was at this time, and in contrast to modern belief, no "clear dichotomy between marriage for interest ... and marriage for affect."¹³ To marry for love was seen as a dangerous step, with the carefully considered and financially advantageous union being much preferred. As M.Anderson explains,

"love ... could not be allowed to interfere with the essential economic functions of marriage."¹⁴

Stone suggests that concern with the personal attributes of a potential spouse was important only for the purposes of breeding.¹⁵ It could be argued, on the basis of Stone's portrayal, that there was, in effect, a "separation between the sexual and the familial."¹⁶ Marriage was a means of pursuing the interests and well-being of the family (the extended family). For the property owning classes at least,

"marriage ... was a collective decision of family and kin, not an individual one."¹⁷

Marriage was not primarily regarded as a relationship for the personal and sexual satisfaction of the spouses. Marriage was seen less as establishing a private relationship between husband and wife than as forging an alliance between two family lines.

A more general, social explanation for the lack of interest in personality was the belief that all individuals were simply links in a grand chain of being. High mortality,

particularly among infants, meant that frequently one child would be substituted for another. A similar pattern was common on the death of a wife. Continuation of the chain - preservation of the family line - should be secured, with little personal interest in the individual links - the spouses and nuclear units.

These are some of the main factors which characterised the open lineage family. It was a family network in which the nuclear group was not prioritised. Instead there was likely to be a much wider circle of more loosely connected relatives and kin. It was a system that was very tightly linked by interests of property and status. Kinship, extended family interest and the elevated position of heritage, particularly among the landowning elite, were highly influential in the formation and regulation of marriage. A similar pattern was to be found among the poorer classes. While concerns of ownership were of less importance to them, the economic functioning of the village community, with the need to preserve and augment what few assets one had, imposed restraints on spouse selection and marriage. With the emphasis on material interests there was little concern for affect. Marriage was regarded as an important event in terms of property and status rather than as an intimate and emotional relationship. It was, finally, a family form that paid little regard to individual personality. The dominant function of marriage, in particular among the upper classes, was to ensure continuation of the family line and preservation of

property, not to ensure personal happiness and individual emotional satisfaction.

Restricted Patriarchal Nuclear Family

Between the 16th and the 18th centuries, the open lineage family gave way to the Restricted Patriarchal Nuclear Family.

Explanation of the open lineage family was, according to Stone, relatively straightforward. It was the simple product of a dominant concern to preserve power and status, apparently with little room for individual feeling or deviance. Explanation of the restricted patriarchal nuclear family is much more complex and fragmented. Stone detects three important factors which contributed to the emergence of this new family type.

There was, first, the demise of kinship and clientage as the guiding principles of society. This could be seen in the declining importance of power and status as reasons for marriage. These did remain important considerations among some sections of society but they were no longer always the only, or the dominant, consideration. Marriage for money or status was suggested to have continued to a later date in merchant classes and the lower middle class, where their position on the economic ladder was somewhat tenuous. Similarly, considerations of status may have continued longer in the backward Scottish society.

"The old considerations of political and territorial alliance were slow to die out, because in Scotland kinship remained an important factor until at least the beginning of the eighteenth century."¹⁸

Family connection and kinship alliance, however, was no longer the main basis of power and social organisation. Alongside the declining importance of status and connection, there were signs of a closing off of the nuclear core of the family. The extended family no longer had the same need or justification to interfere. There was a decline in the network of links that had previously maintained the extended family. This could be seen in the decreasing claims to patronage, cousinhood and hospitality and in the reduction of control exerted by the wider family over the arranging of marriage and over the economic standing of the new unit.

The second factor which Stone identifies as influencing the developing family form was the rise of the state. This was closely connected with the first factor, the decline of kinship. There was a shift in personal allegiance from the family line, the kinship, to the centralised state and the sovereign. It was, as described by Stone, "a shift from a 'lineage society'" to a "civil society."¹⁹

Stone explains the influence of the rise of the state by saying that,

"the modern state is a natural enemy to the values of the clan, of kinship, and of good lordship and clientage links

among the upper classes, for at this level they are a direct threat to the state's own claim to prior loyalty."²⁰

Thus there was a decline in allegiance to a family or kinship line and an increasing emphasis on direct allegiance to the state.

The third factor discussed by Stone was the growth of Protestantism. The emerging ideal of the Protestant church was conjugal affection which contrasted with the previous Roman Catholic ideal of chastity. The marriage bond was sanctified through the Protestant teachings with increased emphasis being placed on the quality of the marriage relationship. Protestantism also emphasised the importance of the family as the centre for religious teaching and worship. The centralised power of the Church was dispersed through the family as family prayers, private morality and confession to each other became the focus for religious activity.

These three factors, Stone argues, created the opportunity for isolation of the nuclear unit from the previous ties and demands of lineage and also introduced the ideal of the conjugal bond, sanctified by religion. There was, therefore, a significant closing off of the nuclear unit. It was less open to family interference and less concerned with preservation of lineage and family property. The emphasis on membership of and allegiance to a family line had switched to direct individual allegiance to the state.

It also had as a focus the religious ideal of conjugal affection which helped to strengthen personal bonds.

Within the increasingly distinct unit of the nuclear family, there was however a new figure of authority - the father. The heightened authority of the father could be explained as follows:

"The growth of patriarchy was deliberately encouraged by the new Renaissance state on the traditional grounds that the subordination of the family to its head is analogous to, and also a direct contributory cause of, subordination of subjects to the sovereign."²¹

With this new vision of a centralised state, stripped of the controlling structure of kinship, there was fear of chaos. Regulation of individual family units was therefore concentrated in the father as head of the household. This structure, it was hoped, would provide social stability and would teach individuals allegiance and obedience within the family which they would then reproduce in their relations to the sovereign.

Patriarchal authority, while good for the father and arguably good for the state, could pose a threat to the weaker members of the nuclear unit. The wife and children were now subject to the will of the father and, through the greater isolation of the nuclear family, they were deprived of the support of the wider kin network. Therefore Stone notes a warning, of potential mistreatment of the wife and children, in the midst of otherwise progressive and welcome

family developments. The increasing isolation of the nuclear unit could deprive the wife of outside support but nonetheless it was,

"an essential preliminary step to clear the way for the subsequent development of the domesticated family." ²²

In Stone's discussion of the developments which produced this new type of family there are signs of growing splits and dichotomies. In particular, there is evidence of the growing dichotomy between marriage for interest and marriage for affect. Although the dominance of property and status continues for a considerable time, at least at some levels of society, the potential for conflict now exists between choice based on considerations of property and power and choice based on personal attributes and expectation of affect.

Closed Domesticated Nuclear Family

The final stage in family development that Stone considers produces the Closed Domesticated Nuclear Family. This family form developed in the late 17th and the 18th centuries and it was characterised by four main attributes. There was, first, a trend away from hierarchy within the family towards more equal relations. The patriarchal family gave way to a relationship which was much less hierarchical and authoritarian. This could be seen both in the greater freedom of children from their parents and in the trend

towards viewing spouses as forming a more equal partnership. Secondly, the nuclear family became increasingly isolated from the wider family and from the community as a whole. This isolation could be seen in the almost complete freedom of children to arrange their own marriages and in the greater privacy accorded to family members, both from each other and from outsiders. This privacy was evidenced most clearly in the changing architecture of their living space. Thirdly, there were signs of much warmer affective relations between family members. This could be seen in many aspects of marital life, including the terms in which spouses addressed each other, their letters and diaries, and also in the treatment of children. The position of children in the family was, in fact, the final characteristic of the closed domesticated nuclear family. Children were now regarded as central to the family, with much care and concern being lavished on them. Children were recognised as a special group, distinct from adults and with particular needs.

The closed domesticated nuclear family differed from the previous types in that it was now a very distinct and isolated unit. It was centred around the conjugal bond, a bond which was entered into freely by two individuals on the basis of personal choice. The relationship of marriage was viewed as a partnership based on affect rather than a hierarchy grounded in authority and property concerns. The nuclear family, rather than being constrained by and

answerable to outside interests, was increasingly inward looking.

This brief outline of the three stages identified by Stone provides a very summarised account of the dense and diverse detail accumulated in his history.²³ It displays the demise of a very open and loosely defined nuclear family, overshadowed by the interests and interference of a wider kinship group and dominated to a large extent by property. This was followed by a gradual closing off of the nuclear unit, with increasing interest in its internal, affective relations and growing emphasis on its individual members. Progress towards the closed domesticated nuclear family was temporarily held back by the authoritative structure of the restricted patriarchal family. It is a story which seems to accord with commonly held views of family and marriage development and it is a pattern which finds support in the progress of the legal reform of matrimonial property rules in Scotland.

These changes, as described by Stone, provide a background picture of developments in terms of marriage and family forms. This is the second historical strand in considering the relations between law, marriage and property.²⁴ Having outlined the pattern described by Stone, I want to go on to discuss in more depth some of the changes, some of the trends, that emerge from his history. I would suggest that the developments that Stone describes may contribute to the confusion of relations between law, marriage and property

and I therefore intend to question them on that basis. The images of change that emerge from Stone's account are to some extent reflected in reforms of the legal regulation of marriage and in particular of property in marriage. Stone's account produces a pattern of change, a collection of images, which I intend to use as a means of analysing the relations between marriage, property and law. I will, therefore, begin a critical examination of Stone's conclusions which will be taken up again throughout the following chapters.

My discussion of Stone's study and of the pattern which emerges therefrom is not the product of a pretended superiority of historical knowledge. Criticism of his work is not primarily of the factual conclusions but of the method that produced them. It is also a criticism which recognises that other historical accounts already exist in contradiction of Stone's conclusions.²⁵

A SENTIMENTAL STUDY

Stone's book involves an attempt to chart changes over three hundred years in marriage and the family, assessed through consideration of personal feelings. His explanation of changes in the family arises from a study of changing attitudes within the family and between family members and outsiders. Stone says of historical changes in marriage and the family that,

"what needs explaining is not a change of structure, or of economics, or of social organization, but of sentiment."²⁶

By concentrating on individual sentiment Stone chooses the most restricted and subjective way of regarding the family. Stone's history has, as a basic element, the progression from a family that placed little emphasis on sentiment to one in which sentiment was supreme. In the early stages he has to describe the demise of this former type of family, which involves him in looking for other explanations and interests. Having pinpointed the disappearance of this early relationship he is free to look at the family from a purely sentiment based approach. In particular Stone suggests that there has been a shift in the central element of the family from property to personal affect. Having identified this shift he is free to concentrate only on internal personal feeling while ignoring, justifiably according to his theory, any outside influence or interference and any continuing place for property.²⁷

Stone sets out to concentrate on sentiment but the pattern which he describes may have repercussions beyond the limits of his intended scope. I would argue that the pattern described by Stone is influential in the relations which are maintained between the family and other social or legal concepts, for example, property. The conclusions of a restricted sentiment based study may characterise the family and relations with it in a much wider sense.

Before considering what effect the family forms that emerge from Stone's account may have on relations between marriage, property and law,²⁸ I want to highlight some of the dominant characteristics of the families that he describes and to consider the pattern of progress that he presents. In particular, three important trends emerge from Stone's history. There is first, a move from a property (power/status/economic) centred family to a family centred on affect; second, the emergence of a closed family unit which is increasingly inward looking and shut off from outside contact and interference and thirdly, a progression from community/continuity, based on interchangeability, to individualism. In considering each of these three aspects of Stone's work, I am concerned with the misleading conclusions which can result from a wholly sentiment centred approach, in particular in terms of the connections between law, marriage and property. My concern is not that his conclusions are in themselves wrong but that because of their restricted nature they are misleading. The images of marriage which emerge from these findings may obscure the continued interaction of law and property with marriage.

The pattern which Stone produces in his account of changes in marriage and the family is central to my discussion of marriage, property and law. The three shifts that Stone describes - property to affect, open to isolated and community to individualism - are shifts that can be detected in legal reforms relating to the property of husband and wife. They describe developments which are

reflected in the pattern of the law. They are also influential in popular perceptions of marriage and its relations with property and law. These shifts described by Stone can therefore be discovered in concrete form in Scots law. They are also present in images which seem to inform our thinking and perception of marriage.

THE RISE OF AFFECT: THE DISAPPEARANCE OF PROPERTY

Stone sets up a major shift in family form from a family which is grounded in property to one which is characterised by affective relations. He begins by describing the pre-16th century family as,

"a structure held together not by affective bonds but by mutual economic interests."²⁹

The extended open lineage family, which Stone described as typical of medieval times, incorporated a series of smaller conjugal units. Each of these units developed from carefully considered and strictly negotiated property and power deals. Family property was an inheritance whose safe passage and possible enlargement was to be secured through prudent marriage. It was, said Stone,

"a family type which was entirely appropriate to the social and economic world of the sixteenth century ... in which connections and patronage were the keys to success."³⁰

With property and economic concerns so important in the formation of marriages, it is not surprising that romance played little part. Indeed,

"the accepted wisdom of the age was that marriage based on personal selection and thus inevitably influenced by such ephemeral factors as sexual attraction or romantic love was if anything less likely to produce lasting happiness than one arranged by more prudent and mature heads." ³¹

Property was important to the medieval family or family line at certain fixed points, for example, on marriage or at death. The act of marriage was a point at which status, power and property would be transferred and so it was at this point of the relationship - the formation of the marriage - that most external family control focused. The main concern of the families was the choice of spouse and the negotiations which would surround the conclusion of the bargain of marriage. Stone emphasises the extent of parental control which was exerted over choice of spouse and, in contrast, he points to the lack of romance, affect or individual preference which was present at that time.

It seems that the absence of personal feeling at the point of marriage can be understood by looking at the overriding concerns of property and status. Could romance and warmer relations not be expected to follow as the relationship developed? Stone suggests that there is evidence of close loving relationships in some marriages of this time but scarcity of primary material makes general conclusions uncertain. He does, however, consider the position of

affect within this family type. He suggests that the individual personality type in this period had a generally low capacity for affective relations. The family members were unable to develop the level of feeling necessary to sustain a close nuclear grouping. Family bonds, therefore, were economic chains rather than the ties of affection which were to follow.

"In the sixteenth and seventeenth centuries there predominated a personality type with low gradient affect whose capacity for warm relationships was generally limited and who diffused what there was of it widely among family, kin and neighbours."³²

In the open lineage family Stone identifies two aspects: the importance of property and the low capacity for affect. These together produce a family unit which is tied by economic concerns and which is characterised by very weak affective relations. Behind the decline of this family type, he highlights the decreasing importance of property interests and the warming of personal relations. From this point onwards his concern is sentiment - a study of the interaction of family members as demonstrated by emotion and affect. He follows the trail of changing personality but apparently dismisses the notion of changing property. Stone describes the declining importance of property as a controlling factor in marriage. He describes the growing emphasis on affect which results from the reduced importance of property and the heightened capacity for personal affect. He does not consider whether there is any continuing place for property.

At this stage in Stone's history there seems to be a split. From being a slave of property, marriage is liberated and given an existence of its own. It becomes a relationship of personal significance. From here Stone follows the development of personal sentiment, the path of affect, ignoring the position of property. In the earlier family network, the formation of a kinship system and the safe and profitable passage of property rights was of supreme importance. With the disappearance of this most obvious aim of the family, Stone tends to see only the warming of affective relations as taking its place. Stone's description of the decline of property interests and the rise of affect signals a point of divergence in marital affairs.

In the restricted patriarchal nuclear family there are still elements of property interest. In certain sections of society, property continued to be an important consideration in the marriage making process. For the elite who continued to control large estates and for the lower classes to whom, "a little capital was so important in the establishment of a secure niche,"³³ commercial considerations continued to be important. But there was also a growing emphasis on the conjugal bond and a realisation that a close relationship between the spouses would not necessarily develop unless they were allowed some freedom in choosing their partner. In this stage of family development Stone considers the loosening of parental control over the process of mate selection. In the

increasing freedom of the individuals themselves and the increasing emphasis on romance, Stone sees further evidence of a shift away from property and towards affect.

In the final stage of the closed domesticated nuclear family, supreme importance is given to the place of affect within the family. The decline in significance of property and status concerns was a necessary preliminary step in allowing choice to be guided by personal preference but the emergence of the affective family was also the result of an increased individual capacity for affect.

"In the eighteenth century there predominated...a personality type with 'steep gradient' affect, whose general capacity for intimate personal relationships was much greater and whose emotional ties were now far more closely concentrated on spouse and child."³⁴

This new type of family was judged on the basis of its affective relations. It was characterised by a very close bonding between husband and wife and between parents and children. There was evidence of increased personal intimacy between spouses and romance, from being mistrusted, became an integral part of courtship and marriage. At the centre of this close nuclear family was what Stone described as the companionate marriage.

The evidence which Stone presents does seem to suggest that there was indeed an increasing emphasis placed on affect and personal happiness in the type of marriage relationship which developed from the 17th century onwards. The decline

in the importance of heritable property and kinship connections was an essential step in allowing affect to flourish. Stone, however, in the pattern he presents, hints at an apparent conflict between property and affect. He demonstrates that in the property centred medieval marriage there was no space for affect. Having described the demise of this particular type of property, however, he does not go on to consider whether in the affective family there is any place for a new type of property. Family property as a controlling factor in marriage disappeared and Stone does not consider what other position property might occupy in the new affective family. In this way I would suggest that he supports and strengthens the dichotomy to which he himself refers - the dichotomy between marriage for interest and marriage for love - and the more general notion of a split between matters of property and matters of the heart. It is not his description of the growth of affect that I dispute but his implication that within the affective family there is no place for property.

This split between property and affect can be detected also in the pattern of legal reform. The abolition of the jus mariti and the right of administration apparently signalled the end of a relationship between marriage and property.³⁵ At least in terms of law, marriage was of no consequence in relation to the property of husband and wife. The property of husband and wife was no longer regulated by specialised rules of Family Law but was governed by the ordinary rules

of property with no regard to the married status of the owners.

Yet this new affective family, which stems from the companionate marriage, is situated within property. The companionate marriage is made possible by the setting of the matrimonial home and it is therein that it flourishes. In his discussion of the importance of romance and its specific expression within the family, Stone concentrates on the changing design of the family home. The affective family of the upper classes lived in homes which displayed three architectural innovations - the ha-ha, the dumb waiter and the corridor.³⁶ These exhibited, according to Stone, an increasingly romantic nature, a further isolation of the nuclear core from outsiders and the intimacy of the married couple. In his unfolding of the closed affective nuclear family, Stone gives some indication of the property that will be significant to it. His sanctification of conjugal privacy and domestic bliss highlights the ascendancy of the role of the matrimonial home. In his physical isolation of the domesticated family, Stone helps in the construction of a sphere of autonomy symbolised by the matrimonial home. The companionate marriage, the relationship that should develop within the closed domesticated nuclear family, is set within the matrimonial home. By idealising the affective significance of this particular family asset, Stone leaves no room for consideration of more selfish proprietary concern.³⁷

Although Stone uses family property to demonstrate the sentiment based nature of the affective family, he does not go on to consider the relationship between marriage and this property. He discusses the type of property in which the ideal marriage is situated but he does not consider the link between the relations of marriage and ownership. In the medieval family, property concerns were evident at the inception of the marriage; in the later, affective family I would suggest that property is an integral aspect of the family form and existence and yet it is used by Stone only to emphasise the focus of the family on personal, affective relations.³⁸ Stone describes the physical proximity of the affective family, the companionate marriage, and domestic property, in particular the family home. He does not recognise the consequent interaction between the legal relationships of marriage and ownership.

Under the system of the open lineage family, the concern was primarily with marriage as an incident of property control and status and not with marriage as a personal relationship. There was therefore no gap between two possibly conflicting aims. The changing nature of matrimonial property³⁹ and the growth of emotional, religious, romantic aspects of marriage meant that there were now two strands to be considered. By the use of sentiment alone, as the indicator of family form in the later stages of development, Stone highlights only one. What Stone describes is the substitution of affect for property in the scale of values at work in the process of

choice of spouse. He emphasises the changing pattern of mate selection. Choice ceased to be dominated by property and was increasingly informed by personal preference. He does not proceed to consider whether or not the absence of property at the contracting of marriage continues throughout the relationship.

INCREASING ISOLATION: THE BIRTH OF THE PRIVATE

Stone's concentration on emotion and inter-personal behaviour serves to emphasise the growing isolation of the affective nuclear family. At the same time, it enables him to deny the need to consider any continuing interaction between family and society. In tracing the decline of the open lineage family and the growth of the closed nuclear family, Stone highlights a shift from an extended family structure to a system comprised of individual independent introspective units. The nuclear family becomes isolated in terms of independence from familial and other external control and it becomes isolated in terms of physical space.

Stone's line of argument in relation to the increased isolation of the modern family is formed around the withdrawal of kin and community and also the tightening of the personal bonds between members of the nuclear unit. With the decreasing control of kin over the contracting of marriage and the community's declining censorship of morality within the marriages of the lower classes, the relationship is apparently released from external control.

It becomes, according to Stone, an area of personal and internal regulation. By this argument, Stone contributes to the image that marriage and the family is a closed unit, unregulated by and in isolation from the outside world.

This is an image which is perpetuated by Stone's concentration on the disappearance of one specific example of external control. As his consideration of property centres on the point of marriage, so to a large extent does his demonstration of the isolation of the nuclear family. Throughout the restricted patriarchal nuclear family and the closed domesticated nuclear family he describes the reduction in parental control over courtship and spouse selection. This is an indication of the couple's increasing isolation. In the physical segregation of the family within their private home there is further evidence of their isolation within their own sphere of autonomy.

A similar pattern emerges from the law of husband and wife. The married women's property reform legislation signals the end of legal regulation of property as an incident of marriage. With the removal of the jus mariti and the husband's right of administration, law ceases to regulate the property of husband and wife during marriage. There is an apparent move both in law and in Stone's history towards reduced regulation of marriage.

In the place of familial or legal control of marriage and the nuclear family there is, however, evidence of newly

emerging potential for control. The area of regulation shifts from the property of the couple to the nature of their relationship itself. In order to fit the woman for her role as companion to her husband and educator of her children, she herself required to be better educated. The standard of education expected of women was generally low with academic achievement being regarded as a male preserve. Increasingly, however, girls would be educated in basic communication and arithmetical skills and also in domestic accomplishments. While some would go on to pursue learning for self interest, the general attitude towards female education was that,

"the accomplishments they sought to acquire would make them attractive as potential wives."⁴⁰

There was considerable debate and argument as to the content of female education. This was typical of a general explosion of opinion and advice as to behaviour within the family and I would suggest that in this there was the potential for a diverse range of external controls to be placed on the so called closed and isolated nuclear family.

Stone himself considers two aspects of this opinion and advice - on child care and sexual relations. There was a great spread of popular literature, educating and advising on both of these subjects. Parents were encouraged to devote much more care and attention to their offspring and

specific attention was given to the encouragement of maternal breast feeding in preference to the use of wet nurses, the abandonment of swaddling, the adoption of specially designed clothes for children which would free them from the harmful constraints of adult fashion and the importance of education. In relation to sex there was an increasing level of, mainly medical, advice usually promoting restraint. There was also, however, a great deal of medical literature advising on general hygiene, health and contraception. A plethora of rules existed as to when sexual activity should and should not be permitted.

This increased external concern as to the inter-personal relations of husband and wife and parent and child demonstrates that, contrary to Stone's assertion that the nuclear family is a closed and isolated unit, it is in fact the object of considerable outside interest and influence. Despite the physical privacy of the child's nursery and the intimacy of the matrimonial bed, new lines of external regulation have emerged which target precisely these examples of the family's isolation.

Stone discusses in much detail the development of child care and the increasing emphasis on personal and sexual relations and to some extent he considers the tensions which this emphasis on the personal relationship provokes. Wives and mothers of the lower classes found compliance with new standards of domestic order and hygiene difficult

to achieve in substandard housing. There were also potentially conflicting requirements:

"many wives found themselves torn between the two sets of new affective responsibilities, towards their husbands and towards their children."⁴¹

His account of the closed nuclear family makes no allowance for those who fail to achieve the affective ideal. His portrayal of the apparent liberation of marriage from external control only mentions briefly the drawbacks in the form of increased tensions or the removal of social and familial props for the couple. He does not proceed to consider the outcome of the collapse of the nuclear unit or of the misuse of the independence which it is apparently granted. He describes the proliferation of advice and opinion as evidence of increasing emphasis on the quality of personal relations between family members. He does not, however, highlight the potential for new areas of external interference and regulation that may result from failure to attain these ideals.⁴²

Stone adheres firmly to his description of the nuclear family as an isolated and closed unit. As a conclusion based on the decline of the control exerted by the extended family over property and choice of spouse this seems reasonable. But the limited nature of his conclusion must be stressed. Having witnessed the death of one very obvious example of external control and interest in the nuclear unit, he looks no further for the emergence of different

lines of external control. In fact he spends many pages outlining new areas of outside concern and influence in the isolated family but he fails to make the connection. As a result, Stone contributes to the image of the modern nuclear family as an isolated, inward looking and private unit.

One final thought on Stone's emphasis of the split between the nuclear family and the outside world:

"These changes in human relations within the microcosm of the family cannot be explained except in terms of changes in the macrocosm of the total cultural system."⁴³

If we are to accept that the nuclear family is in fact an isolated unit, largely unregulated by external control, can we also accept Stone's conviction that the microcosm of the family reflects the macrocosm of society? The falsity of this statement becomes apparent, I would suggest, in further analysis of Stone's third major trend - the move from community and interchangeability to individualism.

THE GROWTH OF INDIVIDUALISM: THE DEATH OF COMMUNITY

The third conclusion of Stone's history which I would question is his account of a shift from interchangeability and the importance of community to individualism. As with much of his study, within the restricted sphere of sentiment, the evidence which he presents supports his

conclusion. It is a failure to look further than the area of personal sentiment which threatens to make his conclusions misleading.

Individualism, according to Stone, played a significant role in the substitution of affect for property as the dominant feature of family form and behaviour. In studying the shift from property to affect and the release of the nuclear unit from external control, the concept of individualism figures strongly. Having outlined Stone's discussion of the rise of individualism I would question it on two grounds: first, his suggestion that individualism within the family follows a general social trend⁴⁴ and second, his suggestion that the rise of individualism marked the death of community.⁴⁵

Stone argues from the basis that individualism within the family is a reflection of individualism within society at large. He begins by setting out the social view at the time of the open lineage family.

"In the sixteenth century and earlier the standard world view was that all individuals in society are bound together in the Great Chain of Being and all are interchangeable with each other."⁴⁶

This view of society fitted well with the family in that,

"one wife or child could substitute for another like soldiers in an army. The purpose in life was to assure the continuity of the family, the clan, the village or the state, not to maximise the well being of the individual."⁴⁷

This position changed in the 17th century to one of a society composed of unique, self seeking individuals. It was this stage of individualism which was identified with the restricted patriarchal nuclear family. Society was now seen as being made up of individuals, freed from their kinship ties and each owing their independent allegiance to the sovereign state. There was fear that this unbridled individualism might lead to anarchy and this was a factor in the increase of patriarchal authority within the family. The final stage of individualism was that which developed in the eighteenth century. Society was now seen as a collection of unique individuals each legitimately pursuing their own ends within a sphere of personal autonomy, restricted only to the extent that was necessary to allow similar freedom to their fellow individuals. It is this final stage of individualism which is identified with the closed domesticated nuclear family.

Stone explains that individualism had two sources. First, a growing personal introspection and belief in the unique nature of each being and second, the desire for a personal sphere of autonomy in which to pursue one's own ends.⁴⁸ This latter aspect also required toleration of the autonomy of others. In society Stone identified many different examples of the growth of both of these aspects of individualism. Personal introspection was evidenced by the passion for keeping intimate diaries and in the burgeoning literature dealing with sentiment. Tolerance and personal freedom were most obvious in the growth of the sovereign

state and the liberal philosophies of laissez faire and freedom of contract.

Both of these aspects of individualism, Stone argues, were reflected in the microcosm of the nuclear family. I would suggest first, that the evidence of individualism within the family may be a distorted reflection of its expression in wider social terms and second, that while individualism was clearly emphasised at one stage of the marriage relationship, it did not necessarily signal the death of community within marriage.⁴⁹

Individualism in society produced a vision of man as an autonomous being, free to choose to enter into obligations. This analogy was evident in discussion of the marriage relationship as a contract. There was certainly evidence of individual freedom in the loosening of parental control over entry into marriage and, at least theoretically, in the apparent shift from marriage as a compulsory obligation to marriage as a freely entered into contract. Stone also used the liberal concepts of free and equal individuals to explain the shift from a family based on hierarchical patriarchal authority to a vision of marriage as an equal partnership. At this stage his argument becomes less convincing. What Stone describes is the triumph of individualism at one stage of the relationship - the point of entry. He concentrates on the change from the selection of a spouse by the extended family, on the basis of economic criteria, to the personal selection of a partner

on the basis of individual character and expectations of affect. The suggestion is that the personal autonomy of the prospective spouses will continue throughout the relationship and yet he offers little evidence in support.

Stone does not consider the socially and economically unequal positions of husband and wife and fails to tackle the question of a split between public and private. While individualism and equality may be present in that each spouse may now call the other by his or her first name and each spouse has important individual roles to play in relation to the family, there is little to suggest that individualism as present in social and economic terms was reproduced within the microcosm of the family. Individualism in terms of sentiment may indeed have been characteristic of the closed domesticated nuclear family. By his contention that individualism within the family was a reflection of individualism in wider terms, Stone's conclusion produces a misleading image. The gap between individualism in each of these spheres will become apparent when the relation between husband and wife and matrimonial property is considered.⁵⁰

Stone's second implication as to the effects of individualism can also be questioned. The facts as presented by Stone clearly show that individual choice and individual personality were the primary concerns at the formation of the modern marriage which was at the centre of the affective family. It is misleading however to assume

that this signals a general shift away from emphasis on the community and the continuity of the family. Stone refers to a radical philosophy which emerged in the 18th century; a philosophy that promoted the search for personal happiness in this world as opposed to delayed gratification in the next.

"By the early eighteenth century complete identification had been made between the pursuit of gratification by the individual and the welfare of the public."⁵¹

Stone uses this philosophy as part of his explanation of the growth of affect. It allows personal happiness and private satisfaction to be regarded as legitimate goals and therefore opens the way for the display of affect and emotion. What he does not go on to consider, to any great extent, is how this philosophy fits with the encouragement of individualism in marriage. He does state that,

"those who wished to reduce the amount of adultery were concerned to make marriage a companionate bond freely entered into, so that sexual passion could be more comfortably confined to the marriage bed."⁵²

He does not go on, however, to link the promotion of individual choice to enter marriage and to select a spouse with the desire to strengthen the community of the family which they will form.

In this aim there is material to suggest that individualism, meaning greater personal introspection and

freedom of choice, is not a value which is inconsistent with a relationship which favours community.⁵³ Stone is correct to describe it as inconsistent with community in terms of the open lineage family; community meaning the extended family as a system based on property and status considerations. He does not, however, go on to consider what role community has to play in the domesticated nuclear family. Stone describes in great detail the companionate marriage, a closely bonded relationship based on interpersonal expectations and satisfaction. Within this marriage he concentrates on the individuals and fails to consider the very strong community which ideally they should create. Again, therefore, his emphasis on individualism at one stage in the marriage process contributes to an image of a shift from community to individualism; an image which is discredited by consideration of the strong community nature of the ideal family which Stone describes as emerging from the individually chosen spouse.

From Stone's presentation of changes I would highlight these three shifts - property to affect, open to closed and community to individual. These are shifts which are central to the discussions in Part II of the continuing interaction between marriage, property and law. Considering Stone's account in isolation there seems evidence to support these shifts. They are also reflected in the developments within law. I will argue, however, that these shifts contribute to the creation of misleading images or perceptions of

marriage and the relations which it has with property and law.

Stone's presentation is therefore important on two levels. First, as the legal reforms explain changes within Scots law of husband and wife, so Stone's account gives some idea of changes which occurred within the personal relation of marriage. It creates a history of marriage. Secondly, the patterns of change which Stone describes may contribute to the creation of images of marriage. They may cloud our perception of marriage. These images, in turn, contribute to the confusion which surrounds the relations between marriage, property and law.⁵⁴

NOTES

- 1 There was reference to the view of marriage as a partnership and the increasing employment of women outside and independent of marriage.
- 2 Scot. Law Com., Consultative Memorandum No. 57, Matrimonial Property, 1983, p.2.
- 3 In Part II I intend to criticise those facts but nonetheless to argue that their truths may have influenced images - legal images - of the relations between marriage, property and law.
- 4 If it was my intention to suggest a perfect parallel between the legal developments in chapter 2 and the changing marital patterns suggested by Stone, there would be two immediate opportunities for criticism - (1) chronological inconsistency and (2) national difference. That is not my intention. I do not suggest an interlocking fit but instead aim to highlight images (false or misleading) which emerge from both of these studies.
- 5 A.Macfarlane in his review of Stone's book in 1979 Vol. XVIII, History and Theory at p.105.
- 6 For example, T.Parsons, "The Isolated Conjugal Family," in M.Anderson, Sociology of the Family.
- 7 P.Aries, Centuries of Childhood.
- 8 As discussed in chapter 2.
- 9 His account has also been the subject of considerable criticism, in particular by A.Macfarlane who disputes, inter alia, Stone's description of the rise of individualism: A.Macfarlane, The Origins of English Individualism.
- 10 L.Stone, The Family, Sex and Marriage in England 1500-1800, p.85.
- 11 Stone, op.cit., p.85.
- 12 It is Stone's abandonment of this method of considering the family's interaction with wider society, in his consideration of later stages of marriage and the family, that I would suggest contributes to certain misleading conclusions: see chapters 5 and 6.
- 13 Stone, op.cit., p.86.
- 14 M.Anderson, Sociology of the Family, p.45.
- 15 Stone, op.cit., p.89.
- 16 J.Donzelot, The Policing of Families, p.24.

- 17 Stone, op.cit., p.87.
- 18 R.K.Marshall, Virgins and Viragos: A History of Women in Scotland from 1080-1980, p.64.
- 19 Stone, op.cit., p.134.
- 20 Stone, op.cit., p.133.
- 21 Stone, op.cit., p.152.
- 22 Stone, op.cit., p.150.
- 23 Stone himself summarised his work from the original book of 800 pages to the more manageable abridged version of 400 pages.
Aspects of these historical developments, as described by Stone, will be considered in greater depth and re-examined throughout this work.
- 24 Relations between these three elements will be discussed in Part II.
- 25 For example, A.Macfarlane, Origins of English Individualism, which disputes the shift from extended to nuclear family as described by Stone and Macfarlane's "Review of Lawrence Stone, 'The Family, Sex and Marriage 1500-1800'," 1979, History and Theory, Vol.XVIII, 103.
- 26 Stone, op.cit., p.658.
- 27 More detailed criticism of Stone's method is contained in chapter 6.
- 28 This will be considered in Part II.
- 29 Stone, op.cit., p.118.
- 30 ibid.
- 31 Stone, op.cit., p.181.
- 32 Stone, op.cit., p.268.
- 33 Stone, op.cit., p.392.
- 34 Stone, op.cit., p.180.
- 35 This is a split which will be reconsidered in Part II.
- 36 Stone, op.cit., p.395.
- 37 See chapters 7 and 8 - discussion of the Matrimonial Home.
- 38 Changing types of matrimonial property and relations between husband and wife and property will be discussed in chapter 4.

- 39 Chapter 4.
- 40 R.K.Marshall, Virgins and Viragos, p.134.
- 41 Stone, op.cit., p.248.
- 42 For example, the Matrimonial Homes (Family Protection) (Scotland) Act 1981 allows legal intervention on the basis of misuse of the family's private, independent space: see chapter 7.
- 43 Stone, op.cit., p.150.
- 44 A split between liberal individualism within the market and within the family is discussed in chapter 7.
- 45 The contrast between individualism and community is discussed in chapter 8.
- 46 Stone, op.cit., p.257.
- 47 *ibid.*
- 48 Stone, op.cit., p.223.
- 49 The description of marriage as a community is intended to convey the idea of marriage as something more than two individuals. These arguments are developed more fully in chapter 8.
- 50 See chapter 7.
- 51 Stone, op.cit., p.266.
- 52 Stone, op.cit., p.241.
- 53 The co-existence of community and individualism is considered in chapter 8.
- 54 This argument will be developed in Part II.

CHAPTER 4: HISTORY OF PROPERTY

Historical changes in the regulation by Scots law of the property of husband and wife have shown the demise of the common law system of combination and its replacement by a system of separate property. Stone's presentation of historical changes in marriage and family relations has indicated a move towards a closed, isolated, domesticated conjugal relationship which has as its focus affective relations between family members. The third element which remains to be considered, from the point of view of historical change, is property. In order to complete the study of the three elements of marriage, law and property, I want to look at property as a separate aspect. A consideration of changes in terms of property will provide the third element of the relations between law, marriage and property.

An understanding of changes in property will complete the picture of the couple, their property and their relations with law. As we have seen changes in both law and marriage, so it is reasonable to expect that property will also have changed. The prevalence of different types of asset has altered, methods of property acquisition and transfer have changed, there have been developments in relations between family and property and there have been new theoretical trends in terms of property and ownership. In discussing legal reforms and changes in marriage, it is therefore useful to consider the types of property that would have

been significant at each stage. This brief historical consideration of property will aim to provide some idea of the type of property that is relevant at different stages in the process of law reform and in the process of development of the marriage relationship.

A presentation of historical change in aspects of property and ownership is, therefore, one function of this chapter. An understanding of property changes has a second and more important function in this thesis. I would suggest that recognition of the changing relevance of various types of assets and of developments in ownership and theories of ownership gives a different perspective on the histories of law reform and marriage that have already been considered. The patterns of change that emerge from historical presentations of the legal reforms and of marriage can be questioned when looked at in conjunction with changes in property itself.¹

Some discussion of property has already emerged in the previous two chapters, from looking at legal reforms and at Stone's account of developments within marriage and families.

Legal reform

From the accounts of legal reform there emerge several ideas about property. Most obviously there seems to be a split between marriage and property. Under the common law a

strict system of regulation was imposed on the property of a married couple and in particular on the property of the wife. Marriage was recognised as a significant event in relation to property and it was the subject of legal regulation and family intervention. The law of husband and wife gradually inserted a series of adjustments and refinements to the system before seeming to abandon regulation of matrimonial property. The introduction of separate property apparently signalled the end of law's interest in matrimonial property. With the removal of the jus mariti and the husband's right of administration, law ceased to impose any scheme of regulation on the property of husband and wife as an incident of marriage. Henceforth the property of spouses would be dealt with under the normal rules of property and regardless of marital status.² The legal reforms therefore suggested a split between marriage and property.

In the process of the reforms there was also some indication of the changing relevance of different types of property. Pressure for reform and the resulting reforms, of the jus mariti, highlight the growing importance of moveable property. In a society where land was the most important asset, the jus mariti was perhaps of limited importance but its significance increased with the expansion of moveables. That the jus mariti was finally abolished in 1881, whereas the right of administration remained until 1920 reflects, perhaps, the greatly

increased importance of moveable property and the urgency of achieving legal reform.

The legal reforms also give some indication of new sources of matrimonial property and of changing relations between owner and asset. The common law would have originally been devised for a system whereby matrimonial property was usually inherited or gifted or entrusted to the couple on marriage.³ Later, it became more common for the couple to acquire property individually in the course of the relationship and for reasons unconnected with the marriage. Signs of these changes can be seen in the legal reforms. Early amendments to the basic regulatory system pick out property which is acquired as the consequence of the individual's labour, rather than property which is inherited or acquired as a gift.⁴

Family history

From Stone's account of family history there also emerge several ideas about property. Stone describes a shift from a family type which had property as a central interest to a family type concerned primarily with affect. In the majority of marriages, property ceased to exert control over the choice of spouse and over the family unit. Instead the choice of partner and the subsequent existence of the couple and their children was guided by personal emotion. The lessening interest of parents and kin in the property consequences of their children's marriage was an important

enabling factor in the development of Stone's companionate marriage. The declining importance of the property and status of potential spouses made personal choice of partner much more widely acceptable. The fall of the property centred marriage cleared the way for the emergence of the modern affective marriage.

There emerges from Stone's account a split between marriage based on property and marriage based on affect. With the rise of the affective marriage, the link between marriage and property is broken. A separation develops in marriage between property and affect, with the resultant claim that matters of commerce and matters of the heart should not be mixed. This is a sentiment which continues to attract much popular support.⁵ Stone traces the development of this split. He notes a move from an age when marriage and money were closely and legitimately linked to an age where thoughts of property seem to sully the personal relationship of spouses. He explains that a conflict between marriage for money and marriage for love did not exist in medieval times. There was no dichotomy between marriage for interest and marriage for love. In his history, in the progress towards the modern affective marriage, he demonstrates the emergence of this split.

Stone uses his theory, of the decline of property in relation to marriage, as an important factor in the emergence of modern marriage and families. The reduction of parental control, which had been inspired by commercial

concern, opened the way for the emphasis on individual choice and individual affection which was essential to the development of the companionate marriage. Stone does recognise the continued existence of property in the modern family. He gives some indication of the changing types of property that are relevant to marriage. He explains that the setting for the modern domestic family and the companionate marriage is the matrimonial home. Domestic accommodation, providing privacy for the nuclear family and purpose for the wife, is an important aspect of the new pattern of family existence. Stone devotes considerable attention to the importance of the matrimonial home in the functioning of the companionate marriage. This central family asset, however, he considers in the discourse of sentiment and affect, ignoring its more basic proprietorial elements. He discusses the matrimonial home as a physical setting rather than as an object of ownership.

From the historical discussion of the changing legal regulation of the property of spouses and from Stone's account of changing marital and familial relationships there emerge, therefore, various indications of developments in terms of property itself. To some extent there is similarity in the property developments that emerge from the discussions of both marriage and legal reform. There is evidence in both of a split between marriage and property. There is evidence in both of a growing emphasis on the individual and the individual's worth. From Stone's work there is also an indication of an

asset of particular value to the modern family - the family home. In neither of these two histories, however, is priority given to these changes in property. The signs of change that I have taken from both the legal reform and from Stone's account are implicit.

To do any more than draw attention to these similarities would be premature. First, I want to consider in more detail the property element itself. The family centred history and the law centred history have provided some insights but I would like to consider separately the aspect of property. As with law and marriage, property cannot be defined as an enduring unchanging concept. It too is susceptible to historical shifts and change and should be regarded as the third variable in the developing relations between law, marriage and property. In considering the legal reforms and the familial changes described by Stone, it is important to note that property may also have changed.

To recount, in detail, developments in the law and theories of property and ownership is quite clearly beyond the scope of this work. This chapter is intended to be only a very general look at some aspects of historical change. I will look broadly at trends in terms of property which seem to be of significance to matrimonial property. Changes can be traced in the history of property in general; alterations in categories of property, structures of ownership and concepts and theories of property. Changes can also be

traced in the more specific range of assets that might be classed as matrimonial or the property of husband and wife.

HUSBAND AND WIFE AND THEIR MATRIMONIAL PROPERTY

One preliminary matter to consider is what is intended by the terms matrimonial property or the property of husband and wife. At times there has been some indication in law of what is meant by matrimonial property. Under the common law, the married couple was regarded as having a combined fund of goods - a primitive communio bonorum. This was their matrimonial property. Outwith this category of matrimonial assets, the individuals might also own some separate estate. In the case of wives, this separate estate was likely to be extremely limited. Despite the restricted nature of their separate estate, there emerges some distinction between property which is legally connected to the marriage and property which an individual, although a spouse, might hold separately from the relationship. One example which was cited in relation to married women was any property interest which the woman had which was alimentary in character. Such provisions were regarded as being so personal to the woman, as an individual, that they could not be subsumed within the couple's matrimonial property. Under common law, therefore, there was legal recognition that some property belonging to spouses would fall within the category of what might be termed matrimonial property. In the case of married women, this would cover almost all of their assets. There was also

recognition, however, that a husband and wife might own some property individually. They might hold assets separate from the relationship and their status within marriage.

With the removal of the jus mariti and the husband's right of administration it became more difficult to find evidence of property which could be termed as matrimonial. For those couples who entered into a marriage contract, some proportion of their funds would continue to be set aside as matrimonial. For others, Scots law ceased to control property as an incident of marriage. There was no legal categorisation of property as matrimonial. Husbands and wives owned assets as individuals with no regard to their marital status. There was some regulation of the property of husband and wife in, for example, the rules of succession but there was no provision for the separate assets of husband and wife to be regarded as matrimonial.⁶

While property was no longer legally defined as matrimonial, some assets might continue to be classified as such because of their practical relations to marriage and their use by the couple. The couple's home, for example, might be considered as matrimonial not because the law defined it as such but because of its close connection with the marriage relationship.

Thus what is meant by talking of matrimonial property may have changed. At times there has been legal recognition of certain property as matrimonial. Following the reforms of

the common law, while there continued to be some regulation of the property of husband and wife on death and later on divorce, there was no legal classification of property as matrimonial. In use, however, certain assets belonging to husband and wife continued to be linked to the marriage relationship and might therefore be regarded as matrimonial. More recently, Scots law has once again introduced the idea of matrimonial property in regulation of the matrimonial home and in the division of matrimonial property on divorce.⁷ Both of these measures continue to recognise that there can be a distinction between property which husbands and wives have in relation to their marriage and property which they hold separately and regardless of their status.

In discussing matrimonial property or the property of husband and wife, therefore, I am referring to property which is either regulated by law as matrimonial property or which is in some way connected with the relationship of marriage.

CHANGING PROPERTY

What follows is intended as a very general discussion of some aspects of change within property. I will concentrate on developments that have already been indicated by the legal reforms and by the changes discussed by Stone. They are developments that have occurred in general terms in relation to property but which are also of particular

significance to the property of husband and wife. There are several aspects on which I want to concentrate - the classification of property as heritable or moveable and the balance between these two types; the growing importance of the matrimonial home; methods of property acquisition and the relationship between owner and asset.

HERITABLE OR MOVEABLE

Both in terms of the general law of property and the law of the property of husband and wife, there is an important distinction between heritable and moveable property. Although these categories have been long established, the legal rules governing them have altered significantly. There have also been considerable shifts in the balance between them, in particular with the expansion of moveable assets. This shifting balance is reflected in the assets that are likely to be owned by husband and wife.

The definition of some property as heritable is a consequence of the rules of succession. Heritable property comprises land and all buildings and fixtures attached to it. For various reasons, particular significance has attached to heritable property; it brought with it important social consequences. Heritable property also had a special relationship with marriage and families. Changes in the legal rules governing aspects of heritable property and changes in the relationship between heritable property and families are, therefore, important elements to be

considered in looking at historical developments in terms of property.

In a feudal society, land was the most important asset. It was a type of property which was significant politically, forming as it did the basis for power and status, in addition to providing personal wealth. Ownership of land, under feudalism, originally required something in return, ie. services, political or military, which it might be argued restricted the freedom of transfer of land.⁸ Land was not a commodity which could be transferred without regard to the nature and ability of the transferee. The power and status which were consequent on landownership made heritable property more than a simple personal asset.

The feudal system in Scotland placed ownership of all land in the sovereign. The king then granted tenure to a relatively small number of landowners who, in turn, would grant tenancies of the land in return for rent. The grant of land was originally made in return for some kind of service from the vassal. In Scotland, the earliest type of feudal land tenure was known as Wardholding. Wardholding required a personal obligation to the superior in return for the grant of land. This obligation of service would importantly include the obligation to provide military service. In later and less troubled times it might more commonly comprise the duty to provide hospitality. The later system of land tenure was called Feuferme. This required an initial payment to the superior in return for

the grant of land, followed by a periodical payment of feuduty. This later system has continued to underlie the modern Scottish system of land tenure.

The original requirement of the feudal system for service in return for land, and the political and social power and status that flowed from land ownership, contributed to a strong drive to retain land within a defined social group. There were accordingly various legal devices designed to regulate and restrict the transfer of land; devices which to a large extent ensured transfer within a limited scope - ideally, within the family. These continued to operate even when calls for personal service had ceased to be made. They maintained close links between a family and its land. The law of succession and the use of entail were two such ways of restricting and regulating the transfer of heritable property. These two branches of Scots law demonstrate the significance of heritable property and indicate its important links with family structure and development.

Succession

The original delineation of the category of heritage is one based on succession; the definition of heritage being that property which would pass on death to the heir at law. The rules of intestate succession granted to the deceased's wife the right of terce whereby she was entitled to receive a liferent of one third of her husband's heritable estate at the date of his death. Later the husband was granted a

similar right in his deceased wife's heritable estate - courtesy. The husband was entitled to a liferent of the whole of his wife's heritable estate. Thereafter the remainder of the deceased's heritable property passed to the heir at law. The law of intestate succession preferred, as the heir, the eldest son. Only if there were no sons and no issue of sons would the heritable property pass to any daughters.

"Scots feudal law recognised primogeniture among male heirs in succession to land and so favoured the maintenance of landed property undivided on the death of the holder."⁹

Thus where there was male issue, the eldest would take the complete heritable estate, maintaining the family fortune undivided.

"This was based on the necessity under the feudal system of preserving the unity of landed estates so that the appropriate military services might be rendered."¹⁰

An heir would be sought first, down the line of direct male descendants, next, among male collaterals and then, among male ascendants. The principle of representation applied fully with, for example, the issue of a deceased son being preferred to a male collateral. In the absence of a male heir, the heritable estate would pass to the female line. If the estate was to pass to females, then it would be divided equally amongst them. They were known as heir-^sportioners.

There was, therefore, a very clear preference for heritage to pass to a male heir and for the heritable estate to resist division. It was hoped that it would pass, complete, to the deceased's eldest son. In that way, large estates would be maintained and a close link continued between particular heritable assets and the family line. Only where no male heir could be found would the estate be divided and shared among the female heirs collectively.

The rules of intestate succession were a very important device for restricting the transfer of heritable property and maintaining close links between a particular heritable estate and a family line. They also contributed to a very sharp divide between heritable and moveable property - both in terms of the law of property and in terms of the relationship between individuals, families and property.

It was of course open to a property owner to make a will disposing of his estate on death. Testamentary bequests purporting to disinherit the heir at law in terms of the heritable estate were, however, invalid. Although the testator was free to dispose of his moveable property,¹¹ he could not avoid the passage of the undivided heritable estate to the heir at law. Gradually the rules governing succession to heritable property were amended, increasing the freedom to dispose of it by will or other testamentary disposition. The Titles to Land Consolidation (Scotland) Act 1868,¹² s.20 permitted the disposition of heritable property by testamentary writing. Following this enactment

the landowner was no longer bound by the principles of primogeniture and undivided succession. As a result, the transfer of heritable property ceased to be so tightly controlled by the law of succession.

It was not until the Succession (Scotland) Act 1964 that distinctions between heritable and moveable property and inequalities between male and female, in terms of succession, were finally removed but an important loosening of the control of heritable property had already been achieved.

Entail

A second effective way of restricting the dispersal of heritable property and of linking it closely to a family line was the legal device of entail. In Scotland, the use of entail resulted from an "intense desire to perpetuate the link between family and territory."¹³

R.Burgess in his thesis on Perpetuities in Scots Law explains that the desire to entail property was often,

"little more than an attempt to achieve immortality by establishing a permanent connection with ... land."¹⁴

The aim of the entail was to alter the normal line of succession, perhaps to ensure retention of heritable property within a very narrow branch of the family or to

exclude inheritance by females. An entail would set out a line of heirs to whom the heritable estate was to pass, undivided. It would prohibit the division of the estate among heir portioners.

The deed entailing the estate would also reduce the power of each successive owner in relation to the property. Burgess explains that,

"the increasing relaxation of the restraints imposed by the feudal system"¹⁵

allowed greater power to the vassal to deal with and ultimately alienate his feu. With the feudal system itself affording less protection for the maintenance of land within a family line, the entail was seen as an attractive alternative. The owner would usually be prohibited from selling any of the estate, sometimes even from granting a lease in respect of it. The entail would also usually forbid the contracting of any debts which would affect the estate. A father could therefore ensure that his chosen heir would have possession and control of the family land during his lifetime but that he could not dispose of the property or in any way burden it. On the heir's death it would pass on to the next heir as laid down in the deed of entail. The entail was a way of maintaining large estates of land undivided and of sustaining a close link between family and land. As with the rules of succession it restricted the freedom to transfer heritable property and

it contributed towards the maintenance of large heritable estates, closely linked to a particular family.

Various statutory amendments were made, increasing the powers of the owner over entailed estates.¹⁶ The final demise of entails was signalled in 1914. By s.2 of the Entail (Scotland) Act 1914 no new entails could be created. In this way the use of entails as a means of controlling heritable property began to disappear.

The rules of succession and the operation of entail emphasised the importance of heritable property and its links to a family line. They were clear attempts to retain heritable property within the family line and to ensure that it was not divided and dispersed, for example, by passing to daughters who would then be subject on marriage to the mixing of their property with that of their husbands. They were also methods of restricting the freedom of the current owner to burden or dispose of the property. The reformed law of succession and the abolition of entails therefore had a significant effect on heritable property. It was no longer so easy to ensure that it would pass, undivided, down through the family line.¹⁷ There was greater individual power in relation to heritable property. There was also much greater freedom to dispose of heritable property on death.

Changes in the rules of succession reduced the legal differences between heritable and moveable property. They

also contributed to the dispersal of large family estates of land, with perhaps a more equitable division between next of kin rather than the enforced inheritance by the heir at law of the complete undivided heritable estate. Another important weakening blow to the continuation of the family estate was the demise of the entail. Succession and membership of a family were no longer such important factors in terms of acquisition of property.

These developments affected the general pattern of landowning and the relative importance of heritable and moveable property. They were also important in terms of marriage and property. Concerns about property on marriage were to some extent similar to the concerns that influenced succession and the use of entail. In arranging a marriage, there was a desire to protect family interests in land and to guard against dispersal of family property. Property deals on marriage needed to be fitted into the structure already put in place by succession and the use of entails. In a society where succession and entail were directed towards ensuring the transmission of undivided family wealth down through a family line, it was reasonable to expect that similar considerations should be apparent on marriage. Marriage offered the opportunity to acquire greater wealth but it also posed a threat.

There were additional considerations on marriage, in particular the protection of the wife and children against the possible inadequacy of the husband. In this respect,

A.W.B. Simpson argues that, in Scotland, the entail and the marriage contract were in fact "antithetical institutions".¹⁸ He argues that the aim of the entail was often to exclude the widow's right of terce from the husband's heritable estate whereas the marriage contract was often aimed at ensuring adequate maintenance of the wife by means of settlement of the couple's heritable property.

Marriage contracts could however be used to protect family interests in heritable property. A marriage contract might incorporate some form of entail. Succession could be arranged and formalised within the terms of the antenuptial marriage contract and a trust could be set up to ensure that property would not deteriorate in the hands of a reckless husband or an indulgent father.¹⁹ Importantly, marriage settlements could be used to ensure the adequate maintenance of the new family and in particular its dependent members. The legal rules governing the property of married women also reflect the structure and the priorities of the system of ownership. The right of administration recognised the value of heritable property to the family line by not allowing it to pass entirely into the husband's estate. Ownership of the property was retained by the wife, with the husband having only the right of administration. The greater extent of the jus mariti might be explained by the lesser value of moveable property.

Domestic Assets and Family Wealth

Changes in legal rules affecting heritable property were accompanied by changes in the types of assets that were likely to be comprised in a personal estate. The balance between heritable and moveable property was shifting not only in legal rules but in physical assets. These developments are relevant in considering the nature of the assets that might comprise matrimonial property. It might be argued that, with the decline of the close ties between families and heritable property which resulted from changing laws of succession and from the disappearance of entails and with changes in economic and social structure, there was also a change in the type of property that was significant in marriage.

Property, it can be argued, has always been of some significance in marriage. There were, however, two levels of property; that of basic significance to the conjugal family - domestic property - and that of extraordinary significance - land and family wealth. All couples would be likely to own at least a small number of assets falling within the first category whereas only a limited group would have assets of the second kind.

"In order to set up a successful marriage in the years between the fifteenth and nineteenth centuries, it was felt necessary to have four types of asset."²⁰

These were, according to Alan Macfarlane, accommodation, furniture and clothing, income and savings. Clearly the quantity and quality of these assets would vary according to the social position of the spouses but this fund can be regarded as forming the simplest requirements for family life. Most couples would have at least some of these domestic assets which would form their matrimonial property. The law of entail, succession and marriage contracts would have little interest in such goods.

These assets necessary to married life would, however, have been superseded in importance in some families by heritable property, comprising interests in land. It was the ownership of such property which attracted most attention and legal interest and which seemed to have the greatest effect on marriage itself. This is the matrimonial property which would have been subject to the control of entails and which would have descended to the heir at law under the rules of intestate succession. This was the property that would have been most affected by the right of administration. Family concern for the protection of this type of property would have inspired the need for parental control of spouse selection, as discussed by Stone.

There have been changes in both of these categories. As I have already discussed, there was a decline in the links between family lines and heritable estates, with the result that such property was of less concern in the formation of a marriage. Developments in the economic structure of

society made the need for a fund of heritable property less important. Previously the property brought to the marriage by the wife would, along with her husband's contribution, have been settled to produce an income for the family or would have been used to finance the husband's business.

"The growth of life insurance, the decline of family businesses, and the growth of joint stock companies all contributed to making a wife's property less essential to a husband's financial success than in the past."²¹

A move away from land based income - rent for the landowner and agricultural produce for the tenant - and towards industry, reduced the fundamental importance of land to the family.

There was also gradually an increase in the volume of moveable assets - furniture, personal belongings, income - which a couple would be likely to own. In this way, there was a shift in the form of property owned by, or in some way attached to, husband and wife. There was a shift in balance between heritable and moveable property and many of the particular concerns which had been directed towards heritable property were no longer relevant. Through various changes in heritable property, the structure of landownership and the transfer of land, the significance of heritable property declined. In particular, heritable property was no longer so closely linked to particular families.²²

Awareness of this shift is important in considering the legal rules relating to matrimonial property and in analysing the reform of these rules. The common law rules dealt with both heritable and moveable property. The right of administration had its foundation in the desire to protect family land and to implement the ambitions of those arranging and forming contracts of marriage, with a view to property protection and gain. By leaving ownership with the wife it reflected the desire to maintain land within a family line. By placing control in the husband it recognised the need for land to be ably administered in order to provide income and support for the nuclear unit. The jus mariti was apparently more far reaching. It granted to the husband ownership rather than the lesser power of control, but in practice its effect was originally limited by the lesser importance and the limited extent of moveable property.²³

THE MATRIMONIAL HOME

Heritable estates may have diminished and their links with marriage and families may have weakened but the importance of one specific type of heritable property continued and indeed greatly flourished. This heritable asset was the matrimonial or family home. The growth in significance of this particular asset merits some attention.²⁴ At this stage I want to consider it mainly in terms of property and ownership.

No doubt it was always desirable for the newly married couple to have some independent residence in which to live and to raise their children. This however was often an unfulfilled ideal with scarcity of housing preventing achievement of the goal of one family per house. Macfarlane, in listing "somewhere to live"²⁵ as being one of the assets necessary to the foundation of a successful marriage, qualifies this by admitting that, particularly among the lower classes, this would often not equate with a home of one's own. He suggests that a shortage of accommodation was in fact an important restraint on marriage among the poorer sections of society, requiring couples to postpone marriage until they had acquired sufficient money to pay for accommodation.

Domestic accommodation has however assumed much greater significance in relation to husband and wife and their children. I would suggest two ways in which the matrimonial home has increased in its importance. First, the nature of modern family life and in particular the promoted roles of wife and mother emphasise the domestic living space of the family. This is usually equated with the family home. Second, there has been a considerable increase, through the 19th century and to an even greater extent through the 20th century, in house building and home ownership. In the majority of present day families there is unlikely to be a large collection of assets, with the most common and important asset being the family home, either owned or rented.²⁶ Therefore the home has become an integral part of

the existence of each marriage and family and it has also become a very significant asset within the property of husband and wife.

The matrimonial home has become an asset that is closely linked to the specific family unit and is vital to the current ideal of the domestic family. To some extent the home may still represent the financial status of the family members but concurrently it has a much more specialised role. It is no longer simply a measure or means of wealth but it is directly entangled with the relationship itself. The home emphasises specific aspects of the modern marriage - privacy, isolation, self sufficiency. It has become much more than the bare provision of accommodation and shelter. It is a way of marking out the domain of the family. It is in this sense that Stone discusses the matrimonial home. Stone describes the changing architectural structure of the house, using its environs as the setting for child rearing and marital companionship. Within its walls lurk the endless domestic tasks that would provide a worthwhile role for the wife and the peaceful haven that would be the reward for the hardworking husband.

The home is linked very closely to the family. It defines and provides the setting for many of the functions that the modern family is expected to perform. As such it attracts the title "matrimonial". It might be argued that the family home is matrimonial property because of its physical use by the couple and their children. It is not property that

bears the title matrimonial because it is affected by the act of marriage, but merits that title because it is of particular relevance to the nature of the marital relationship.

Beyond providing a setting for family life, however, the matrimonial home has also become an important piece of property - an increasingly widespread heritable asset. It is matrimonial property in that it is essential to the existence of the marital and familial relationships but it is also likely to be the property of husband and/or wife.

A variety of factors contributed to the growth in housebuilding and the growth in home ownership. The development of land, perhaps by the building of houses on it, would in earlier times have been seen as part of the role of the major landowners. The building of houses and the subsequent lease of them was one way of utilising land to produce income.

"Houses were in a significant way a source of revenue through rents for their owners."²⁷

By the 19th century, house ownership had become an important form of property although personal occupation was not always the primary purpose. House building and ownership provided a potential source of income in a similar way to that of agricultural use of land in previous centuries.

"For many of the 'propertied classes', houses or the land on which they were built, comprised part of the family property and might well be settled on trust to provide a secure income."²⁸

Gradually the importance of house ownership changed, with owner occupation becoming much more widespread. This was the result of a variety of developments. As I have already described, there was likely to be greater and more equitable division of heritable property. Instead of the eldest son inheriting the complete estate it was now more likely that the deceased's heritable land would be shared among the children. As a result each had the opportunity to build their own home on the land which they received. This situation to some extent replaced the previous position of the sole heir using some of his inherited land for development purposes; building houses for rent.

The development of centralised control over planning and development may also have been influential. It was no longer left to the landowner to build as he wished. The improving landowners of the 18th century who might have redeveloped their estates, providing houses for their tenants and workers, were gradually replaced by the industrialists and the expansion of urban settlements. With the development of towns, there emerged also an increasing body of rules and requirements governing planning and building. All of this contributed to the more organised and centralised development of urban domestic accommodation.

From the 18th century onwards an organised and strong banking system began to develop. Of great significance in the increase in housebuilding and the increase of owner occupation was the growth of bank lending and in particular the setting up of building societies. Permanent building societies began to be established in the early 19th century, encouraging saving and allowing for the building and purchase of housing. This extended the scope of home ownership to a much wider range of families. Instead of paying rent to a landlord throughout one's lifetime, it became possible to purchase a home of one's own. This was generally achieved, through building society or bank loans, by spreading payment of the purchase price over many years.

These specific developments against the background of a more stable society and rapidly increasing economic strength, contributed to an increase in housebuilding and a strong desire among the population to own domestic accommodation. Particularly among the growing middle classes, home ownership was an important sign of status and stability.

Therefore the home became a domestic asset of considerable significance. It could be termed as matrimonial property because of its central position within the newly emerging ideal of marital and familial existence. As a result of increasing housebuilding, increasing affluence, industrialisation and urbanisation, it also became more common for husbands (and occasionally wives) to own a

house. Therefore a house was likely to form part of the property of husband and wife.

PROPERTY AS A REWARD FOR LABOUR

"During the greater part of historical time there has only been one kind of property of general practical importance, that is land."²⁹

Land as a source of revenue to the landowner or as a means of subsistence to the peasant was, for the majority of the population, the most significant asset. For the landowner, his land produced rental income from his tenants. For the tenants, land provided work and livelihood. In the 17th century,

"it was reckoned an inferior and less desirable thing to receive a wage for work than a fragment of ground in the farming community."³⁰

Thus in the feudal society of that time,

"landless labourers and indoor farm servants ... who received some wages in money"³¹

occupied a social rank beneath even the meanest crofter. Land, however, gradually gave way to the rising importance of moveable property and, in particular, money. A society based on the status which attached to land and ownership of land was replaced by an economic and commercial society.³²

An important element in this transition was the rising incidence of paid employment.

"Closely connected with property is employment, that is service rendered for pay."³³

Increased numbers of people who worked in return for money had a significant effect on concepts of property. Income in monetary terms developed as an important type of property, with increasing numbers of individuals and families relying for support on an earned wage rather than on income from land. The increase in paid employment, however, also had a close link with the developing nature of property and ownership. It has been argued that work in return for remuneration can only operate successfully in a society where rules and concepts of property are at an advanced stage.

"Security of enjoyment of the fruits of one's labour was the reason for property."³⁴

So said Bentham and it was a philosophy that gained much support in the 18th and 19th centuries. With the decline of succession as a primary source of acquiring property, with changing agricultural practice and with the vast expansion of industry, individual labour became an important means of amassing wealth and assets. The wage earner emerged as the key to property acquisition rather than inheritance, marriage settlement or land. With the establishment of a market economy, individual enterprise and labour became

more decisive in the attribution of rank and status. Property became a reward for labour to a much greater extent than it had been previously. The dominant idea of property became something which could be acquired in exchange for labour or money, rather than being transferred through succession or marriage. The benefit of ownership and personal assets were seen as an incentive to labour.

"Unless labour leads to property, neither our self love nor our affections for others will make us work."³⁵

Such views of the relationship between labour and property emphasised the personal link between owner and asset. Property was to be looked on as a reward for diligence and enterprise. In a developing industrial society, which had great demand for labour, the promise of private income and property was seen as an important incentive.

"The common interest of all requires that all should be obliged by their own necessities to some sort of industry; now no man would employ his labours unless he were assured of having the fruits of them at his own disposal."³⁶

It could be argued that the changing source of property acquisition affected the way in which the relationship between owner and property was perceived. Property was increasingly considered as a personal reward for individual labour. This was a philosophy which was also relevant to matrimonial property. The changes brought about by industrialisation and the developing modern capitalist structure, together with legal changes, contributed to the

lessening of the importance of inheritance as a source of property and placed greater emphasis on individual labour. In a feudal society and in a society of primogeniture, impartible succession and entail, property and wealth was to a large extent determined before birth. It was based on one's family and not on individual enterprise. With the emergence of the wage earner, however, property and matrimonial property became more likely to be acquired during the currency of the marriage relationship.

"The trend was for more, and more household relationships to involve a cash nexus."³⁷

A shift, therefore, from inheritance or settlement to income altered the mode of acquisition of the property of husband and wife and it made it more likely that such property would be acquired gradually throughout the relationship, rather than the couple starting out in married life with a fund of assets which could be used to produce income. The shift to earned income also had important effects on the way in which property was viewed. Property, meaning income or the assets purchased with such income, was considered as a reward for labour and the individual's right to such reward was to be protected. Therefore property increasingly meant income and assets acquired as a result of income. The wealth of a married couple and their issue was more likely to reflect the earning ability of the spouses rather than the inherited status of their ancestors. This growth of income was

accompanied by a concept of property as a reward for individual labour.

A further development in terms of income, was the development of the "family wage." Rapidly increasing affluence among the middle classes emphasised the idleness of the middle class wife. The ability to "keep" a wife was an indicator of financial success.

"The practice of keeping women as pets, regardless of their (economic) usefulness, is a modern innovation, a result of the industrial revolution and the rise of the bourgeoisie."³⁸

It was a practice that the working classes were eager to emulate and it gave rise to the campaign for a family wage. During the late 19th century and on into the 20th century, trade unions campaigned for a family wage for their members. Despite some success the family wage remained, for many workers, an unachieved ideal but it was nonetheless an important ideological concept. It was an incentive to greater effort among the workforce and it reinforced the image of a single male breadwinner supporting his wife and children who remained within the home. By giving to the male worker a family wage, it would enable him to provide the property of the family. The family wage would continue to make it the husband or father's,

"prerogative to go out and work for [the family's] living, to attend to its needs, and to control and administer its capital."³⁹

Thus, for an increasing number of individuals and for an increasing number of families, property was likely to be the product of labour. Personal property was an incentive and a reward for work. The property of husband and wife was more likely to be the earnings of one rather than the contributions of two. The ideal of the maintenance of wife and children through the efforts of the husband was strengthened by the campaign for a family wage.

PROPERTY AS THE ASSET

Discussion so far has tended to concentrate on changes in particular types of property and in their significance to individual owners and to families. Theories of ownership have also changed. Not only the forms of property but the nature of the concept of property is significant and changes can be detected in it. One development which is evident in the previous discussions of heritable and moveable property, the family home and earned income is that of viewing property as a particular asset itself rather than as a right in the asset. Under feudalism it has been argued that it was not the asset itself but the particular rights in it that constituted the property. Under feudalism,

"property had generally been seen as a right to a revenue (whether in the form of services or produce or money) rather than as a right to specific material things and had not been seen as the material things themselves."⁴⁰

Property was important not only or primarily for its material form but for what it yielded. Land which was inherited might provide an income in terms of rents. Property brought by a woman to marriage would often be used to provide an annuity for her in the case of her husband's death. It might be combined with property contributed by the husband to maintain husband, wife and children or to form a financial base for the husband's business. The heritable property of husband and wife might be conveyed to trustees to provide a secured income for the couple.

In a feudal system,

"a man did not have property in an object, but only in a certain interest in an object, and ... a number of estates of property belonging to a number of persons might inhere in the same object."⁴¹

When one piece of land afforded rights to several individuals, the worth was vested in the right rather than in the land itself. Property held on trust might provide rights of income for husband, wife and any children although none of them had the right to dispose of the capital. Similarly, when land was held on entail it provided income for successive owners but each was restricted in his use of the land.

The weakening of the kinship network, previously in control of large landed estates, resulted in heritable property becoming much more closely and specifically attached to

individuals rather than to a family or kin group. The individual was seen as having a right to the land itself rather than having a right to something from the land. He could make use of the land or sell it for money instead of simply deriving income from it.

The rising importance of moveable property also highlighted the particular asset. With the move towards waged labour, earned income became the most widespread type of property which might be used to accumulate specific assets. These assets in turn were less likely to produce income but would be for personal use. Income would increasingly be used to furnish the family with the necessities of domestic life and to satisfy individual desires for adornment, leisure and acquisition. In the light of these developments it can be argued that a much greater identification was achieved between the concept of property and the physical asset itself.

Property came to be regarded as an end rather than as a means to an end. With a changing economic structure based on industrialisation and capitalism, income was increasingly the result of labour. As a result, property was no longer primarily regarded as a source of income. Property was increasingly seen as an end - privately owned assets which in themselves provided some use or benefit to the owner. This is a development which can be seen in the decline of family heritage, the expansion in moveable

property, the increase in owner occupation and the emphasis on personal income.

The foregoing discussion has been intended to highlight aspects of change within terms of property and ownership. It makes no pretensions to the creation of a comprehensive history of property. To discuss legal reforms relating to the property of husband and wife and to examine the apparent disappearance of property from the relationship of marriage without considering the nature of such property renders any emerging conclusions of limited value. In this chapter I have aimed to sketch roughly a background of property developments to the legal reforms and social changes that were presented by the legal writers and by Stone. This is an element of change to which, I would argue, they paid too little heed and it is to that proposition that I will turn in the following chapters.

NOTES

¹ In this chapter, I will outline some historical developments in terms of property and, in particular, property of husband and wife. The importance of these changes when considered in conjunction with historical patterns of change in legal reform and marriage will form the basis for Part II.

² Scots law continued to intervene in the regulation of property of husband and wife through the law of succession and later through the law relating to financial provision on divorce but that is outwith the scope of my study. There will be some discussion of property division on divorce in Part III because of the close links between the nature of the marriage relationship and the approach which is subsequently adopted on divorce.

³ This is the system discussed briefly in chapter 2 of the wife's tocher and the husband's contribution which together would form the financial base for the marriage union.

⁴ Section 1 of the Conjugal Rights (Scotland) Amendment Act 1861 and s.3 of the Married Women's Property (Scotland) Act 1877 both offered protection for property acquired by the wife as a result of her own employment or industry.

⁵ "There is a nobility of purpose in marriage and in the union of two human beings that a pre-nuptial contract offends." B.Amiel, The Sunday Times, 16 June 1991. This perceived and promoted separation between marriage and commerce will be discussed in chapter 7.

⁶ It might be argued that there is a very limited exception to this in the wife's praepositura which is, perhaps, evidence of a very limited recognition of property that was for the combined domestic use of the couple.

⁷ Matrimonial Homes (Family Protection) (Scotland) Act 1981 and Family Law (Scotland) Act 1985.

⁸ The system of landownership in Scotland of course remains feudal in structure, although the giving of service in return for land has been replaced by payment of a feuduty which in turn is being phased out. The Land Tenure Reform (Scotland) Act 1974, abolished the creation of new feuduties and provided for redemption of feuduties either voluntarily or compulsorily on the sale of property. Thus although the feudal structure of superior and vassal remains, the element of service has been removed. The future of the feudal system is itself under consideration by the Scottish Law Commission: Discussion Paper No.93, Property Law: Abolition of the Feudal System, 1991.

⁹ W.M.Gordon, Land Law, p.3.

¹⁰ M.C.Meston, The Succession (Scotland) Act 1964, p.5.

11 Freedom to dispose of moveable property was subject to the legal rights of a surviving spouse, the jus relictæ and the jus relictî. By these rights, the surviving spouse was entitled to either one third or one half of the deceased's moveable estate, depending on whether or not there were issue.

12 (31 & 32 Vict., c.101).

13 A.W.B.Simpson, "Entails and Perpetuities," 1979 J.R. 1.

14 R.Burgess, Perpetuities in Scots Law, p.9.

15 Burgess, op.cit., p.11.

16 For example, the Rosebery Act 1836 (6 & 7 Will IV c.62) and the Rutherford Act 1848 (11 & 12 Vict c.36) extended the powers of the holder of entailed land.

17 The result of these changes was not the immediate disintegration of all heritable estates. Maintenance of large holdings was, and continues to be, possible through the use of wills but it became a matter for the individual landowner to consider.

18 A.W.B.Simpson, op.cit., p.13.

There is an apparent distinction between the woman's interest, which is protected in the marriage contract, and the family interest, which is protected by entail. This is a distinction which S.Staves argues is frequently found in legal histories which exclude women from an integral place within families: Married Women's Separate Property in England, 1660-1833, p.203.

19 There is further discussion of the use of marriage trusts in chapter 8.

20 A.Macfarlane, Marriage and Love in England, 1300-1840, p.263.

21 D.Gittins, The Family in Question, p.77.

22 For some families there remains a strong link with land. In Scotland, the continuing pattern of landownership is that "the majority of land [is] held by a few large-scale landowners. For example, 60% of Scotland's land area is owned by 1,430 landowners": Robin Fraser Callander, A Pattern of Landownership in Scotland, p.9. Or as the 7:84 theatre company indicates, 84% of the country's wealth is owned by 7% of the population. The importance of heritable property was therefore concentrated within a very small group of families.

23 The significance of the changing nature of matrimonial property in relation to the legal reforms and the pattern of marital development will be discussed in chapter 5.

24 The dark side of the matrimonial home, exhibited in the

incidence of domestic violence, is discussed in chapter 7 and the rights of husband and wife to occupy the matrimonial home are discussed in chapter 8.

25 A.Macfarlane, Marriage and Love, p.263.

26 Manners and Rauta, Family Property in Scotland, 1981, H.M.S.O. The findings of this study, which are reproduced in Scot. Law Com., Consultative Memorandum No.57, Matrimonial Property, 1983 at p.14, suggest that, "apart from ownership or tenancy of a house, many married couples in Scotland own very little property...household goods, some small savings and, possibly, a car."

27 W.T.Murphy and H.Clark, The Family Home, p.2.

28 *ibid.*

29 G.D.Valentine, "Persons and Funds," 1936 J.R. 256.

30 T.C.Smout, A History of the Scottish People, 1560-1830, p.125.

31 *ibid.*, p.136.

32 One example of this could be seen in the feudal land tenure system itself, in the replacement of the requirement of service in return for land by the payment of a feuduty in cash.

33 G.D.Valentine, *op.cit.*, p.258.

34 C.B.Macpherson, "Capitalism and the Changing Concept of Property," in Kamenka and Neale (eds.), Feudalism, Capitalism and Beyond, p.113.

35 P.Stein, "The General Notions of Contract and Property in Eighteenth Century Scottish Thought," 1963 J.R. 1, at p.6.

36 Francis Hutcheson, Introduction to Moral Philosophy, II.5.4.

37 L.Davidoff, "The Rationalisation of Housework," in Barker and Allen (eds.), Dependence and Exploitation in Work and Marriage, p.132.

38 S.Kappeler, The Pornography of Representation, pp.70-71.

39 F.Hegel, The Philosophy of Right, p.116.

40 C.B.Macpherson, *op.cit.*, p.110.

41 G.D.Valentine, "Persons and Funds," 1936 J.R. 256. Land in Scotland continues to be held under a feudal system but feudalism as discussed here refers to a feudal society as opposed to the modern system of feudal landholding.

PART II
IMAGES OF CHANGE

PART II

IMAGES OF CHANGE

In Part I of this thesis I have set out separate presentations of change, in Scots law as it relates to the property of spouses, in marriage and in property. These presentations have produced patterns of change and developments from the past. They are not the product of personal empirical study but are collected from the work of others.

What I have presented are historical accounts of change in law, in marriage and in property. In this thesis these accounts have several functions. First they provide information about what has changed in each of these three elements. They provide histories of law, marriage and property. Secondly, I want to use the method and structure of these histories to demonstrate how they have contributed to the confusion of relations between marriage, property and law and to pick out particular images that they have helped to create. Thirdly, I want to analyse continuing relations between marriage, property and law in the light of these images.

I. HISTORICAL CHANGE

In Part I, I presented accounts of historical change in law, marriage and property. They provide some background of factual

change in these three elements. But, in particular in terms of legal reform and marriage, the historical accounts are more than simple factual change. They are presentations of these changes which include judgements, imply expectations and point towards patterns and trends of progress. Not only do they recount change but they contribute to perceptions of how things have changed. In particular, the pattern of reform of the married women's property rules and its discussion by legal writers and the pattern of progress described by Stone both point towards similar characteristics of marriage and similar trends in its relations with property and law.

II. IMAGES OF CHANGE

In Part I, I have already begun to question these perceptions; to question the patterns of change that emerge. These are perceptions which may distort the precise nature of developments from the past and may in turn obscure our understanding of contemporary relations between marriage, property and law. In Part II, I want to use the three histories to suggest that by their method and their structure they have contributed to misleading images.

I will begin by reconsidering the historical presentations of legal reform and of marriage. I would suggest that their conclusions can be re-examined in the light of changes in property. The misleading nature of the conclusions that emerge from the legal reforms and from Stone's account can

be exposed if the parallel changes in property are considered. Recognition of significant developments, in types of asset, in relations between families and property and in concepts of ownership, enables property to be re-inserted where the legal reforms and Stone's history had suggested its disappearance.

Having re-established a relationship between marriage and property I want to proceed to consider in more general terms the misleading images that may emerge from histories which try to look at the elements of law, marriage and property in isolation. In Part I, I presented isolated accounts. I would now suggest that this method of historical study distorts change and implies misleading conclusions. It contributes to the creation of images - images of law, marriage and property; images that obscure their interaction.

CHAPTER 5: CHANGING PROPERTY: CONSTANT LINK

"The linkage between family, law and property is constant ..."¹

This statement seems to be in strong contradiction of the histories of law and marriage as presented in chapters 2 and 3. At first glance, both the history of the legal reform and Stone's history of marriage and family life would seem to suggest quite the opposite. They suggest breaks between each of the elements of marriage, property and law. They suggest a split between marriage and property which accords well with popular presentations of a split between romance and commerce, love and money. They also suggest a split between law and matrimonial property. This chapter seeks to investigate Glendon's claim that there is a constant link between family, law and property. It argues against the apparent break displayed both by the legal reforms and by Stone's history. It seeks to re-establish the link.

SIGNS OF A SPLIT

In the presentation of the legal reforms there is a split between law and marriage/ matrimonial property and an apparent split between marriage and property. The reforms produce a break between law and matrimonial property. They also suggest a break between marriage and property.

The legal reforms produced a break between, on the one hand, law and, on the other hand, marriage and the property of husband and wife. There was a move towards reduced legal intervention. The most obvious example of legal regulation had previously been the jus mariti and the right of administration. These were devices which operated automatically, by force of law. They represented significant legal intervention in the marriage relationship. With the removal of these two rights there was a break between law and marriage/ matrimonial property. Marriage no longer occasioned legal regulation of the property of husband and wife. There may have been some expectation on behalf of the reformers that the property aspect of marriage would be handed over to voluntary private regulation. By improving the position of wives through the reforming legislation, however, a significant impetus to private regulation of property on marriage was removed. Marriage contracts, although they often did more, were generally used to exclude the husband's jus mariti and right of administration in order to afford the wife some separate estate. With the universal exclusion of these rights by legislation, the need for private regulation was apparently reduced.² So, not only was there a split between the basic legal system and matrimonial property, there were also signs of a split in the decreasing use of private regulation of property on marriage.

In the legal reforms there was a clear split between law and matrimonial property. To a great extent there ceased to

be any law of matrimonial property. There were also signs in the reforms of a split between marriage and property. Under the common law system with its jus mariti and right of administration, there was a very clear link between property and marriage. The position of owner and his/her rights in relation to assets were to a great extent affected by marriage. The position of a woman as a property owner was, in particular, affected by marriage. Ownership and interests in property were closely connected to status and marriage was an important determinant of status. There was a close link between property and marital status.

Marriage was a significant event in the transmission of property and, in particular, heritable property. At the time of marriage, negotiations were common between husband and wife and their respective families as to the transfer of property to the new couple and as to the subsequent use and eventual disposal of such property.³ Marriage, between spouses of the property owning classes, would normally involve a marriage settlement clearly stating the property to be brought by each party to the union and defining their subsequent rights in such property.

With the passing of the Married Women's Property (Scotland) Acts⁴ and with the declining importance of marriage as a method of property transfer,⁵ there appeared to be a split between marriage and property. Under the reformed legal structure, marriage ceased to have any significant effect on the property of spouses. Separate property in effect

meant that individuals held property regardless of their marital status. With the removal of the jus mariti and the husband's right of administration, the need for a marriage contract became in many cases less urgent. The wife no longer needed the protection of a marriage contract, excluding the husband's rights, to enable her to own and administer property. In the removal of jus mariti and the right of administration, there were signs of a break between marriage and property. Marriage ceased to have an effect on the property of individuals; on the property of husband and wife. With the declining importance of land as a source of wealth and with the rise of earned income, there was a break between marriage and property.⁶ Previously marriage had been an important incident in ownership and transfer of land. Increasingly marriage as a factor in ownership gave way to individual labour and personal earnings as a means of acquiring property.

Thus, far from supporting Glendon's claim of a constant link, the historical presentation of the legal reforms seems to suggest the appearance of cracks between law, marriage and property - a loosening of ties between these three elements. As a consequence of the reforms there was a clear split between law and matrimonial property. Law no longer intervened in marriage for the purpose of regulating the property of husband and wife. The legal reforms also suggested a split between marriage and property. In the abolition of the jus mariti and the right of administration there appeared to be a break between marriage and property.

Entering into the relationship of marriage ceased to have any effect on the property of the spouses. Henceforth ownership was to be attributed with no regard to marital status. Therefore in the legal reforms there is little to support the claim of a constant link between marriage, property and law.

What of Stone's history of family and marriage? It too seems to refute rather than support Glendon's claim of constancy. It suggests a split between marriage and property and a declining role for regulation of marriage and property.

Stone has, as a central theme in his history, a move from marriage that is grounded in property concerns to marriage that is characterised by affect. He describes the gradual transition from a system where,

"property and power were the predominant issues which governed negotiations for marriage,"⁷

to a system where personal affect and,

"romantic love [were seen as] respectable component[s] of marital strategy and married life."⁸

In Stone's history he suggests that there has been a basic shift in the focus of marriage from property to affect. In the open lineage family, marriage, particularly among the upper classes, was strictly controlled by property

concerns. Marriage was viewed as an incident of property control and a question of kinship alliance rather than as a personal relationship. Gradually, through the restricted patriarchal family to the modern domestic nuclear family, the connections between marriage and property were weakened, leaving the modern companionate marriage as a relationship of purely personal and affective significance. According to this pattern, property no longer exerts control over marriage and the family unit - a unit which is held together by private, personal emotions. Marriage centres on affective relations rather than on property interests.

In the declining importance of property to marriage, Stone also sees a decreasing level of external regulation. Marriage becomes a relationship increasingly controlled by the spouses and their own personal preference and desire. Parents and kin, freed of property concerns over the marriage of their children, lost the justification to interfere or to seek to control the choice of spouse. This would later (and outwith the timescale of Stone's account) be reflected in the reforms which gave legal recognition to the private, non-regulated, nature of the marriage relationship and which left regulation of property to the spouses themselves.

Thus, in both the legal reforms and in Stone's family account, there is evidence to suggest that, contrary to Glendon's claim, the link between family, law and property

is not constant. The law reforms produced a break between law and matrimonial property. They resulted in the disappearance of a scheme of legal regulation which was imposed as an incident of marriage. There was, therefore, a clear break between law and property. The removal of the jus mariti and right of administration also suggested a split between marriage and property. There was no legal recognition of any continuing link between marriage and property. A similar split between property and marriage is indicated by Stone's account of family change. It is important to note that, whereas a split between marriage and property was implied both by the law reforms and by Stone's account, a split between law and matrimonial property was express.

The system of separate property which existed as a result of the reforms provided for no link between law and matrimonial property. It was clear evidence of a break between these two elements. Discussion of recent legislation shows that there has been a move away from this extreme position. Legal measures such as the Matrimonial Homes (Family Protection) (Scotland) Act 1981 and the Family Law (Scotland) Act 1985 demonstrate a renewed link between law and matrimonial property. These will be discussed more fully in chapters 7 and 8. There I will discuss situations in which law shows an interest in matrimonial property; instances of legal regulation of marriage and the property of husband and wife. Strict application of a separate property system does deny a link

between law and matrimonial property. Recent refinements of the separate property system, however, make it clear that law maintains a link with matrimonial property.

In this chapter I want to concentrate on the relation between marriage and property. Both the legal reforms and Stone's account suggest a break between marriage and property which contradict Glendon's assertion of a constant link. What of the apparent split between marriage and property? In this chapter I intend to concentrate on re-establishing a link between property and marriage. I propose to reconsider the reforms and Stone's account of change and to suggest that they present a misleading image of a break between marriage and property. Their presentation of change fails to take account of changing types of property and thus suggests the disappearance of property from marriage rather than considering that property itself may have changed.

Mary Ann Glendon argues that,

"the linkage between family law and property is constant, but its elements - family behaviour, the forms of wealth and their relations to each other - are not."⁹

Failure to take note of developments within each element have tended to obscure the linkage. Legal writers have considered changes in the element of law. Stone has considered changes in the marriage element. What neither has adequately considered are changes in property and the

effect that such changes might have on the relations between law, marriage and property.

Both of these portrayals of change use the demise of one set of property based rules as evidence of a much greater split between property and marriage. They assume the continuation of property as a constant element. They demonstrate a failure to acknowledge the changing form of property and the consequent changes in its relations with marriage and law. As with law and marriage, property is a variable concept. Its form cannot be taken as fixed and enduring. Types of property that were relevant to the marriage for which the common law rules were devised may not be relevant to Stone's modern affective family. Failure to consider the variations in property, therefore, casts doubt on the break between marriage and property which is suggested by both the legal reforms and Stone's historical account. Relating changes in property to the reforms and to Stone's account suggests the disappearance and the emergence of different types of property rather than the complete rejection of property as a concern of marriage and of family law.

M.A. Glendon argues that "new property assumed an important place in family property"¹⁰ and that a failure to consider the nature of this new family wealth contributed to a clouding of the relations between property, marriage (family) and law. I propose to reconsider the account of the legal reforms and Stone's account of the changing

marriage relationship from this standpoint. The relations between marriage and property, considered from the point of view of Stone's history of marriage or from the historical legal account of the Married Women's Property reforms, tend to be misrepresented because of an omission to trace the history of property. Instead they simply assume its disappearance on the basis of an outdated image of property. In Part I, there were three separate histories. The history of the legal reforms and Stone's history of marriage both suggested a split between marriage and property. By inserting into those histories, some aspects of change within the third history of property, I will question their conclusions.

Some kind of property, it might be argued, is and has been relevant to most marriages. There could be two levels of property that were significant to a marriage.¹¹ Most couples were likely to have some assets which fell within the ordinary domestic category, for example, household items, income and accommodation. A more restricted class of couples would also have an interest in heritable property - family land. A consideration of the changing extent and importance of these two types of property perhaps clarifies some of the confusion surrounding the relations between marriage and property. Recognition of changes in property questions the split between marriage and property that emerges from the legal reforms and from Stone's account.

There were changes in both of these types of property. There was a great decline in the link between a family line and heritable estate and in more general terms there were significant changes in relation to heritable property. There was also considerable growth in volume and ownership of moveable assets and of the type of property which could be regarded as domestic. These developments were influential in the legal reforms governing the property of husband and wife and I would suggest that they also help to complete the image which Stone portrays of a changing type of family and marital relationship. By including a consideration of property it is possible to highlight significant changes in property rather than accepting its disappearance from marriage.

To assess the importance of the common law rules relating to matrimonial property it is necessary to look at the type of property that they were designed to regulate. The reforming legislation of the late 19th and early 20th centuries may suggest an increasing gap between marriage and property. The removal of the jus mariti and the right of administration points towards a break between marriage and property and indicates an end of legal interest in matrimonial property. A closer look, at changes in property and the types of property affected by common law rules, might show that the reforms indicated something other than the apparent clean break. The reform of those rules may signify changes in particular types of property rather than indicating a general change of policy towards the

importance of property within marriage.

DECLINE OF FAMILY HERITAGE

Glendon points to several factors that contributed to the link between family law and property being hidden. She argues that the legal rules outlived the economic structure for which they had been created and consequently the link between the law, marriage and the property of husband and wife was distorted.

"Even when the economic and family behaviour of members of the groups for whom the rules had been primarily designed changed, the rules did not."¹²

This may be a helpful way of looking at the right of administration and its ultimate abolition. The right of administration had its foundation in the desire to protect family land and to implement the ambitions of those arranging and forming contracts of marriage, with a view to property protection and gain. The husband's right of administration was designed primarily to regulate, not the domestic type of property, but the type of property that was of concern to a wider group than that of the nuclear family. It was designed to control heritable estates in which other members of the family might have an interest. It allowed the husband control of property which was closely linked to the maintenance of the family and which might be an integral part of the husband's business.

Marriage was important to the protection of family land and to the formation of kinship links and property expansion. The land itself was unlikely to be directly related to the marriage relationship as is heritable property in the form of a home. It was more likely to provide a source of income. The changes in heritable property that have been considered in the previous chapter weakened the need for the right of administration. The decline in the importance of the relationship between land and family, the break up of large family estates, the changing rules of succession, the disappearance of entail, the decrease in the political and social consequences of land ownership and changing business and economic structure questioned the necessity of this measure of control. The demise of the right of administration can to a large extent be explained by reason of the demise of the type of property which it had been designed to protect.

Relating the reforms to changing needs, based on changing property, disputes the suggestion that the reforms were the product of a general change in direction of the law towards property or indeed of the rejection of property as a valid concern of marriage.

In a similar way, I would suggest that an understanding of the composition of matrimonial property questions to some extent the clearcut division between property and the affective marriage that is presented by Stone. The abdication by parents and kin of control over the making of

marriages may be of less significance if we also recognise that the parents and kin had lost their interest in the match.

Stone concentrates on the supremacy of property in relation to spouse selection. If marriage, to the landowning classes, was a means of acquiring and protecting property then clearly the choice of spouse was of prime importance. In charting the fall of the property centred family, Stone bases his argument to a large extent on the changing behaviour and relations of those members and branches of the family previously linked together by mutual economic interests and previously capable of exerting control over spouse selection. In the weakening of this control he identifies the disappearance of property. Stone concentrates to a large extent on the upper classes in his study of the extended patriarchal family. It was in this group, where financial risks were greatest, that the controlling power of property was most obvious.

"Authoritarian control by parents over the marriages of their children inevitably lasted longest in the richest and most aristocratic circles where the property, power and status stakes were highest."¹³

From the ashes of this old family he sees emerge the modern family, based on individual affect and freedom from constraint as a result of outside interests. With the declining importance of marriage in relation to control of land, he identifies the withdrawal of outside regulation of

the marriage relationship and he sees the disappearance of property from marriage. Having traced the decline of family land as an influence in allowing a new freedom in marriage, he does not proceed to consider what place there may be for new types of property within this marriage.

It could be argued that, by the time reform was achieved, the right of administration had to a large extent become redundant. There was little property left of the type for which it had been designed. A developing labour market, changing economic structure and increased commercial borrowing contributed to the lessening importance of land as a source of income. There was less need for the control of family land to be placed in the hands of the husband. Changes in the spread of ownership and in the importance of heritable property questioned the continuing relevance of the right of administration. It may, therefore, be unwise to credit its removal with indicating any general change of policy. Instead it may have been a belated attempt to bring the law up to date with property developments.

Recognition of the changing nature and importance of heritable property might similarly question the apparent disappearance of property from marriage as described by Stone. What he portrays is the decline of a particular type of family property and the consequences of that decline for the marriage relationship.

INCREASE IN INCOME

Whereas with the right of administration it could be argued that it had become redundant, the problem with the jus mariti was that it was being overused. By the time it was reformed it had become much more significant because of its widespread and perhaps unforeseen application.

"A ... factor that submerged the link between family law and family property was the application of the old rules to great numbers of persons who did not have significant wealth."¹⁴

This seemed to apply in particular to the jus mariti. The jus mariti was apparently more far reaching than the right of administration in that it gave to the husband ownership rather than simply control of his wife's property. In practice, its effect was originally limited by the lesser importance of moveable property. Whereas the right of administration may have been abolished because of a reduction in the type of property which it was designed to control, I would suggest that the abolition of the jus mariti was more the result of an increase in the type of property which it affected. The jus mariti can be criticised on many grounds but to some extent its survival can be understood in terms of the type of property which was in existence. As Lee Holcombe has argued,

"when personal property was of relatively little importance compared with land, and when it was produced or used by the family or household functioning as an economic unit rather

than by individuals, perhaps it mattered little in practice that married women could not legally own such property."¹⁵

With changes in production and economy, particularly following industrialisation, the form and content of matrimonial property was likely to change. Income and moveables became much more prevalent, with this new type of property spreading quickly through the burgeoning middle classes. A particularly important development in relation to matrimonial property was the increased access of women to paid employment.

As stated in the Petition of the Married Women's Property Committee in 1856,

"the law expresses the necessity of an age when the man was the only money-getting agent; but...since modern civilisation in indefinitely extending the sphere of occupation for women has, in some measure, broken down their pecuniary dependence upon men, it is time that legal protection be thrown over the produce of their labour ..."¹⁶

It has been argued that women's increased activity in employment and the economic sphere was largely responsible for the dismantling of the common law system of regulation. The inequities suffered by women do seem to have provided the impetus for several of the earlier reforms which specifically exempted from the jus mariti earnings which the wife received independently of her husband. It was difficult to argue against a wife being given control of her own earnings in the face of the philosophy that

property offers an incentive to labour and the importance of guaranteeing property in the fruits of one's own labour.¹⁷ Perhaps an even stronger impetus to change was the desire to avoid the need for public support of abandoned or neglected wives and children. Speaking of the reforms in England it was argued that,

"if the husband failed to support his family it was considered better that the wife go out to work than the family come onto the poor law. This was a major consideration in the debate over the Married Women's Property Act of 1870, which gave legislative protection to women's earnings."¹⁸

The growth in moveable property resulted in a growth in significance of the jus mariti. It applied to all moveable property and thus affected earnings. As increasingly women would have income or moveable property of their own, the jus mariti acquired a much greater significance. The operation of the jus mariti was also questioned by the increasingly personal nature of property - the importance of the link between owner and asset. This trend in philosophy made the jus mariti difficult to sustain.

Consideration of changes in the nature of property and the type of property that was relevant to marriage emphasises the specific nature of the reforms of the Married Women's Property legislation. Legal accounts of the legislation suggest a break between marriage and property, a lessening of legal control, a preference for liberalism and private autonomy. Stone suggests similar conclusions - the

replacement of property with affect, the closing off of marriage from external regulation. The reforms may be discussed within terms of the general sweep of liberalism or the emancipation of women. To subsume them in this way, within a change of policy, may be misleading. The legal reforms in themselves were much more specific.

The disappearance of one specialised form of property removed the need for a legal regime to deal with it. Even where such property was concerned it had become usual practice for a private agreement to be negotiated to govern ownership and control. Thus the right of administration was often avoided even in the situation for which it had been intended. Marriage contracts were also increasingly used to exclude the husband's jus mariti. Failure to concentrate on the original link between marriage and property; the link which had produced the common law rights, may have contributed to the total abandonment of legal regulation of matrimonial property. The immediate necessity of reform was simply to remove the anachronistic rules. There was no attempt to consider those rules in relation to specific property and to consider what property might now be significant and what rules it might require.

Therefore, following the legislative reforms of the late 19th and early 20th centuries, there was no legal regulation of matrimonial property. The indication was that property and marriage were quite separate. There was no link between property and marriage and there was to be no

link between law and matrimonial property. It has been said of the property system that existed after the Married Women's Property reforms that it had,

"two main defects - firstly that there is no system and secondly that there is no matrimonial property."¹⁹

Recent legislative reforms have shown signs of recognising that, contrary to the apparent break between marriage and property which was indicated by the reform of Married Women's Property laws and contrary to the image that Stone portrays, there is a link between marriage and property and it is a link that law has been forced to regulate.²⁰

NOTES

- ¹ M.A. Glendon, The New Family and the New Property, p.117.
- ² Marriage contracts would continue to be used, as they are today, for marriages where the wife was considered particularly vulnerable, for example, where she was an heiress.
- ³ The significance of marriage in relation to property was evident in the common law practice of tocher and donatio propter nuptias and also in the use and development of marriage contracts.
- ⁴ See chapter 2.
- ⁵ See chapter 4.
- ⁶ These changes in property apply to the majority of individuals and families, with substantial landowning being restricted to a small minority.
- ⁷ L.Stone, The Family, Sex and Marriage, p.87.
- ⁸ L.Stone, op.cit., p.267.
- ⁹ M.A.Glendon, op.cit., p.117.
- ¹⁰ *ibid.*
- ¹¹ See discussion of Domestic Assets and Family Wealth in chapter 4.
- ¹² M.A. Glendon, op.cit., p.108.
- ¹³ L.Stone, op.cit., p.184.
- ¹⁴ M.A.Glendon, op.cit., p.108.
- ¹⁵ L.Holcombe, Wives and Property, pp.34-35.
- ¹⁶ This petition, presented to Parliament on 14 March 1856, is reproduced in L.Holcombe, Wives and Property, Appendix 1.
- ¹⁷ See discussion of Property as a Reward for Labour in chapter 4.
- ¹⁸ J.Lewis, Labour and Love, p.104.
- ¹⁹ M.C. Meston, "Matrimonial Property in Scotland," 1970 J.R. 193.
- ²⁰ The ways in which this link has been recognised and regulated in law will be discussed in the chapters on Privacy and Individualism.

CHAPTER 6: IMAGES OF THE FAMILY

"'The family' ... is not merely an economic unit, nor merely a kinship structure; it is also an ideological configuration, with resonance far beyond these narrow definitions."¹

The developments in the regulation of matrimonial property may have been intended by the legal writers to be read within the narrow bounds of law reform. The developments in marriage that Stone describes may have been intended for use within the confined scope of sentiment. Within those restricted areas, the conclusions that emerge may be unobjectionable. As Barrett and McIntosh argue, however, these descriptions may contribute to the construction of a widely diffused ideology of marriage.²

Criticisms may be made of traditional presentations of legal reforms or of sentiment based histories of marriage but their conclusions, the trends and characteristics which they produce, are still influential in the creation of an image of marriage. Having outlined an historical account of marriage and of legal regulation of the property element of marriage, I would suggest that several characteristics have emerged. An image of marriage and its relations with property and law has developed. In using the term image, I intend to convey the idea of an outward appearance. It is the appearance of marriage as perceived by those within and without the relationship. In using the term image, I also want to include the suggestion of illusion, meaning "a

false or deceptive appearance."³ Therefore, the historical accounts tell of real change but they can also contribute towards an image of change which contains elements of deception and illusion.

One aspect of this image has already been considered. I suggested that the historical accounts of legal reform and of marriage, that are discussed in chapters 2 and 3, give a false picture of the disappearance of property as a concern of husband and wife. The reform of the Married Women's Property laws did not result in the introduction of a new system of matrimonial property regulation. The jus mariti and the jus administrationis were removed but nothing new was put in their place. Instead the general rules of property were left to govern the property of all individuals, regardless of their marital status. The pattern of reform suggested the disappearance of matrimonial property as a specific category of property. The principle of a separate property system, that marriage, in itself has no effect on the property of the spouses, contributed to the image of marriage and property as unrelated.

Further support for this image was found in Stone's description of historical progress in marriage and family relations. A fundamental shift in Stone's history is from marriage based on property to marriage based on affect. Stone charts the decline of kin and family interests in heritable property, which had previously operated as a

controlling factor in marriage formation. In the absence of these property interests within marriage, he finds only personal affective relations. He seeks no place for a new kind of property. As with the pattern of legal reforms, Stone's presentation of marriage suggests that the link between marriage and property has been dissolved.

The contribution of these separate developments to the creation of the image of a break between marriage and property has already been discussed.⁴ When changes in property, marriage and legal regulation are considered in conjunction, however, the constancy of a link between these three elements once again becomes evident. This link between property, marriage and law can be seen in recent legislation which departs from strict separation of assets. Recent legislation suggests that it is now recognised, in some situations, that property remains as an important aspect of marriage. In the final two chapters I will discuss situations in which a link between marriage and property has been recognised by law. These are instances where, contrary to the image of a break between marriage and property, legal regulation demonstrates continuing relations between them. First I want to consider other characteristics that have emerged from the historical presentations of marriage, property and law and to use them in later analysing the continuing relations between these three elements. The histories of legal reform, marriage and property have cast up various common characteristics which

contribute towards a perception of marriage, property and law and their interaction.

A perception of marriage may influence the ways in which it is regulated by law. In this chapter I intend to consider some of the limitations of traditional family histories and also to recognise the influence that they may have on the way in which families and marriage are perceived. Traditional methods of analysing marriage contribute to the creation of an ideal of marriage; an image of marriage. This image may in turn influence the relations that marriage maintains with property and law. Criticisms that can be made of traditional family accounts are also applicable to the way in which legal histories have been presented.

FAMILY HISTORIES

"It has become an essential ritual of our societies to scrutinize the countenance of the family at regular intervals in order to decipher our destiny, glimpsing in the death of the family an impending return to barbarism, the letting go of our reasons for living ..."⁵

This ritual can be seen in the many historical accounts which have been produced of marriage and the family. There exists a vast literature analysing, recording and comparing family life and form; a literature which presents a confusing and often contradictory pattern. Within many of these accounts there are three tendencies highlighted in this quotation. First, it is frequently assumed that there

is one universal family form. Secondly, marriage or the family itself is taken as the starting point - the point of scrutiny is "the countenance of the family". This pattern of study is frequently family centred. Thirdly, there is a tendency to look for changes - to search for "the death" or "the letting go."

These methods of studying family relations contribute to a portrayal of marriage and families as isolated, fixed and linear. Developments in these relations are frequently presented in terms of progression and as distinct from, for example, social and economic existence. The restricted nature of such studies can produce a distorted vision of marriage. Interpretation of isolated change within marriage may produce a distorted image of change.

THE UNIVERSAL FAMILY

Family accounts have often been criticised for their failure to recognise the existence of multiple family forms. To talk of "the family" is to disregard variations produced by locality, class, religion, age, individual preference etc. In an area of study where agreement is hard to find it has been said that,

"the one unambiguous fact which has emerged ... is that ... there is not, nor ever has been, a single family system."⁶

There is nonetheless a tendency to talk in terms of The Family; a universal form. To some extent both Lawrence Stone and the legal reforms are influenced by a single, dominant family.

Stone, in his account, does describe developments within households of different social classes. Within each stage of family development - open lineage, restricted patriarchal and closed domesticated nuclear - he considers changes within families of differing social status. At each stage, however, his concentration focuses on one dominant family, with practices in other social and economic classes being presented as variations.

In the open lineage family Stone describes the importance of the wider family and kin network. Their influence on individual marriages is largely the result of their property interests in the marriage. The restrictions on courtship and choice of spouse that are characteristic of the open lineage family are the product of the economic concerns of property owners. The absence of close nuclear bonds that characterised the open lineage family was also, according to Stone, to be found in the families of the poor. For them, however, there was less obvious need to restrict marriages and choice of spouse. Property concerns were of little significance in the formation of marriage among the poor. Among the propertyless, however, Stone suggests that the interference of neighbours and community hindered the development of close personal relationships.

Stone concedes that within families at this economic level, marriages may indeed have been made for love but, in the absence of historical evidence, he devotes little time to this possibility. He argues that a wide network of kin and a low level of affect was characteristic of the open lineage family. He gives convincing evidence of why that should be among property owning classes, where property concerns simply left little space for love to enter into the formation of marriage. His explanations as to why this family type should also prevail among the lower classes is less compelling. I would suggest that the open lineage family that he describes is predominantly the family of the propertied classes.

In later descriptions of the closed domesticated nuclear family, he concentrates on the family of the middle classes. With some exceptions, they are free from the restraints previously imposed by property interests. Changing economic structure has released them from dependence on family assets as a primary source of income. They are able to indulge in the modern form of breadwinner/housewife family and to live in the newly designed, private family home. Stone points to the difficulties experienced within working class households of conforming to the bourgeois model. The propertyless and those of limited wealth continued to be more closely concerned with the economic base of any marriage relationship. The very rich also continued to have an interest in property and kin. In so doing, he recognises

the existence of variations throughout social classes but prioritises the model of the middle class marriage. This form of marriage and family is presented as The Family, with couples in other social strata being measured against this model.

Stone therefore recognises the co-existence of various family types depending on their social and economic status. He himself warns that "generalizations about family change" must be "qualified by a careful definition of the class or status group."⁷ In his presentation, however, he tends to prioritise one type of family as being The Family, with the others referred to as variations. He devotes much greater attention to the families of the upper and middle classes, tending to pass over the lower classes with the excuse of inadequate evidence or the explanation of a time lag.

In the legal rules of matrimonial property there is also evidence of the influence of a particular family type. The jus mariti and the jus administrationis are more easily understood in terms of a property owning family. They can be considered as primarily aspects of the general property system rather than as aspects of marriage. As M.A. Glendon argued, the family law of the 18th and 19th centuries was shaped by the needs of the property owning classes.⁸ The increasing need for reform of these rules was emphasised by the rejection of them by those families for whom the rules had been devised. Property owning families used marriage contracts to avoid the jus mariti and right of

administration and to negotiate private marriage settlements. In England, they turned to Equity to escape the effects of the common law system. The legislative reforms to a large extent were based on the private arrangements that propertied families were already accustomed to make for themselves.

It can be argued that the law reformers were guided by the pattern of property arrangement within families that owned significant assets.⁹ Developments in social and economic terms, however, had resulted in property being owned in smaller amounts but by a much wider section of society. By the time that the common law of matrimonial property was reformed, matrimonial property was likely to have changed in nature and to be owned by many more couples. It seems, however, that, in the reforms, the legislators continued to be guided by one particular family form.

There is a tendency for both Stone and the legal reformers to concentrate on and give precedence to one particular family type. In the case of Stone this may result in an overly stark presentation of the shift from property to affect as the focus of marriage and family relations. Privacy of the nuclear family from kin intervention might be seen as a development only in landowning families, rather than as a general trend at all levels of society. The move described by Stone is most noticeable in the families of the propertied classes because it is reasonable to assume that it was within those families that

parental control had been most strict. In relation to the reforms, the apparent benefits of a separate property system and of legal withdrawal might have been questioned by recognition of a variety of family types, rather than concentration on those that owned significant assets.

Changing characteristics may therefore be given excessively wide application because of a failure to detect various co-existent family types. To present a change in The Family may imply a more significant development than would be shown if this family is recognised as only one of several. To base legal reforms on one type of family may result in a system that prejudices others.

FAMILY CENTRED

Even in those studies that emphasise the variety of familial forms that co-exist, there is still a tendency to begin with the family or the various families; to analyse the countenance of the family rather than to look at its points of interface. Many writers, in charting developments within family relations, present their theory as the definitive image of the family. The family exists in the described form for the reasons and to fulfil the aims which they outline. It has an independent existence outwith the individual elements of its members. It is a pattern to which the members conform or against which they rebel rather than being viewed as the result of interaction

between family members and between members and the outside world. Analysis centres on the family.

It is a common feature of family histories that they present a linear progression; a changing but unitary picture of the relationship. Historical studies of marriage and families provide many examples of a tendency to make definitive statements on the nature and change of family life and form. Such accounts have attracted criticism for many reasons: their scope was too narrow or too wide, the data on which they relied has been discredited but ultimately their fault lies in attempting to find one single, linear, family centred progression. There is a recurrent tendency to credit the family with an autonomous existence; to posit it as a pre-given institution. To take marriage or the family itself as the constant starting point and to attempt the creation of a monolithic theory of marriage or the family is itself a flawed pursuit.

Stone himself warns against "the many pitfalls of any unilinear theory of history."¹⁰ And yet, it seems that Stone fails to take his own advice. Stone's study falls within the category defined by Donzelot as "family centred." His mammoth task involves an attempt to chart changes in the family over three hundred years, assessed by means of consideration of personal feelings. Although Stone identifies a wide variety of causes and influences, and recognises, to a limited extent, that variations exist between social classes, he still produces a linear,

historical account of families; a progression from an open, loosely connected group to a closed nuclear unit.

In presenting a picture of change that in general is "one of inexorable progress"¹¹ Stone does create a linear account of family development. Alan Macfarlane in his review of Stone's book argues that Stone proceeds from the basis of "a whole set of assumptions about progressive evolution from the past"¹²; assumptions that Macfarlane believes to have been discredited. He also recognises that an important contributory factor to Stone's linear account lies in his "isolation of the 'family' as an institution, thus taking it out of its embedded context."¹³ I would argue that this method of looking at the "countenance" of the family, studying it as an isolated institution, is a significant factor in the production of a misleading image of family relations.

It has been argued that,

"much of the work on the history of the family is conceptually wedded to an acceptance of the distinction between the family itself, and the larger world ..."¹⁴

In his history Stone explains how this gradual distinction between family and society was achieved. Stone presents, as a central element, a shift in the focus of the family from property to personal affect and having identified this shift he is then free to concentrate only on internal personal feeling while ignoring, justifiably according to

his theory, any outside interaction. He explains (creates) this separation by concentrating his gaze within the family. He uses external developments to explain developments within the family. He does not consider points of contact between family and society but produces an account of the family as a reflection of society. He uses changes in social mores, in philosophy and in personality, to create an image of the modern family. In so doing he shuts out the world external to the family. Stone's extensive study of the historical development of the family suggests an introspective, family centred pattern which conflicts with the pattern emerging from a more diverse study of intersections between family, property and legal regulation.

Stone describes the separation of family from society, the closing off of the nuclear unit. He explains the rise of the closed, affective family based on sentiment and personal emotion. He recounts how the family shuts itself off and thereby justifies his method (and that of others) of studying families as if they exist in isolation. In his history Stone produces evidence to allow us to look at the family in isolation. There is no need to consider its continuing interaction with other aspects of society because, as he has explained, the family is separate and it is inward looking. Stone's work helps to demonstrate the creation and sustenance of an image of the family as isolated, self-centred and inward looking.

There is evidence too in the historical presentation of the legal reforms of a linear progression. Domination to equality, legal regulation to private control, community to individual, the demise of matrimonial property: these straight progressive developments emerge from a law centred presentation of the reforms. The reforms are shown from the point of view of law and legal rights. As such they create expectations of equality, freedom from legal regulation and personal autonomy.

The common law of jus mariti and jus administrationis gave legal recognition to the importance of the link between marriage and property. Property was regulated as an important incident of marriage. On the removal of these rights no new system of regulation was introduced and, therefore, from a legal point of view, property seemed to have disappeared from marriage. Considering the reforms from a legal perspective, there was no need to look for a changing relation between marriage and property because matrimonial property had disappeared from the law's scope of concern.

The jus mariti and right of administration imposed a legal system of hierarchy and domination. They gave to the husband legal rights over his wife and her property. With the reforms introduced by the Married Women's Property legislation, this system was replaced by a regime of legal equality. Husband and wife were to be treated by law on a gender neutral basis. Each was to have equal legal rights

to own property. Therefore a linear, law centred discussion of the reforms presented the achievement of legal equality.¹⁵ From a law centred approach, there was no discussion of economic or social status.

Equally clear from the legal reforms was a move from a system that combined the assets of husband and wife to one that treated them as entirely separate. From the perspective of law reform, all aspects of community had been removed. Legally the property of each spouse remained his or her own. The removal of the right of administration and the jus mariti signalled the end of the submergence of the wife's property in that of her husband. Instead each spouse retained the right to own his or her separate assets. The reforms, presented by a law centred analysis, took no notice of the practical community of marriage.

In Stone's history we have a family centred history. In the presentation of the legal reforms we have a law centred history. Each presents developments from a single isolated perspective. In so doing, I would suggest that the developments imply expectations and consequences that may not be fulfilled when viewed in terms of relations between each isolated element. In studying the family in isolation, Stone produces characteristics of modern marriage and familial form which may be misleading. They are characteristics that describe the sentiment aspect of marriage and family but which do not reflect the position of this element within a much broader range of relations

that converge in marriage and family existence. In presenting the legal reforms in isolation, legal expectations are created that may not be fulfilled when the legal rules are inserted within marriage and property relations.

Recognition of the limits of traditional historical studies influenced the approach adopted by Donzelot in his account of family regulation. He rejected the conventional approach, replacing it with a method which would,

"posit the family not as a point of departure but as a moving resultant."¹⁶

Donzelot, in discussing the historical writings of Philippe Aries¹⁷ and Jean-Louis Flandrin,¹⁸ highlights a problem with their work which can equally be applied to Stone. He asserts that,

"the disadvantage of this fascinating and meticulous restitution of the familial past is in the haphazard nature of this separating out of mentalities, in the fuzziness that it allows to settle in between this domain and that of economic and political transformations."¹⁹

Donzelot is looking at relations between the family domain and the politico-economic domain. I would suggest that the criticisms he makes could be directed to Stone's familial account in terms of its failure to consider relations between the family domain and, for my purposes, transformations in terms of property and law. Siting his

analysis within the family, Stone sees the disappearance of property which had previously operated as a barrier to affective relations. His narrow range of vision does not allow him to detect new points of intersection between marriage and property. Similarly from the point of view of sentiment, Stone finds an increasing privatisation of the relationship; a discovery which then prevents him from looking for alternative public intrusions into the family. Individualism is also found within the scope of sentiment and Stone's restricted range does not allow him to locate other instances of community.

The law reforms and their presentation might also be criticised for their narrow vision, their focus on legal rights. Their introduction of legal equality takes no account of social and economic inequality; their setting free of matrimonial property from regulation takes no account of the effects of non-regulation and, their emphasis on individual legal rights takes no account of practical community. Thus their presentation in isolation creates legal expectations that may not be fulfilled.

In this study I would suggest that the relations between law, marriage and property can best be traced by studying the connections that are maintained between them instead of tracing isolated change; looking for the disappearance of one aspect, or indeed the end of the relationship. Instead of detecting points of intersection, Stone identifies disappearance. This is an unavoidable result of his

restricted vision. Stone "posits the family" as his "point of departure," just as the legal writers posit the legal rules as theirs. And so each produces only one aspect of the relationship.

DEATHS AND DICHOTOMIES

One consequence of adopting a family centred approach is a narrowing of vision. By concentrating on developments or changes within the family, such accounts are blind to the re-emergence or re-alignment of aspects which seem to have disappeared from their previous place within the family. It is characteristic of much writing on marriage to pick out "deaths": the death of the family, the breakdown of the nuclear unit, the demise of the property centred marriage. It is a tendency which appears in Stone's history and which is also evident in presentations of the legal reforms. In Stone we see the death of the property centred family, the death of external regulation of the family and the death of community. Similarly in the legal reforms there is presented the death of legal regulation of matrimonial property and the death of community. With the discovery of these endings, these deaths, I would suggest that there is a narrowing of vision.

With the presentation of these endings we tend to expect change, to anticipate new policies. Stone's account suggests the gradual abandonment of an old philosophy of

marriage and families and the substitution of a new approach. Despite Stone's recognition that

"generalization ... imposes an artificial schematization on a chaotic and ambiguous reality,"²⁰

he proceeds to create such an artificial scheme. The legal reforms are seen as signs of change - they are presented as turning points. In the reforms we look for new aims and new motives. Both contribute to the creation of splits between the old and the new; they add to the divisions which are apparent in marriage and in its relations with property and law; they strengthen and fix the existence of the family.

In addition to narrowing the scope of investigation, the identification of splits supports the creation of dualisms. There is in liberal thought a "tendency to a dichotomous distinction."²¹ It is a tendency that is evident in Stone's history and also in presentation of the legal reform of the Married Women's Property laws. Stone supports the existence of three main dualisms - property/affect, public/private, community/individual. Throughout his account he presents the demise of the first element of each of these pairs and the rise of the second. He presents these elements in opposition, thus creating apparent conflicts between them. Similar splits are presented in relation to the legal treatment of matrimonial property between enforced public

regulation and private arrangement and between community and separate property.

This discourse of dualisms insists on categorisation into one or other domain. It constrains relationships within the requirements of only one side of a balanced pair. This method of discussion presents illusory distinctions. It imposes artificial divisions. The imposition of these artificial divisions has implications for the development of relations within the family and between the family and the outside world. It also has implications for the scope of legal reforms.

The dichotomy most often discussed in family terms is that of public/private. Fran Olsen in her discussion of the split between market and family highlights the restricting and confining nature of this division. She argues that the dichotomy "reifies ... abstractions" and "renders us powerless."²² So long as existence is divided into two, the potential for reform is limited. Reforms can only attempt to make each side more like the other or more like itself. Changes within the family are constrained by a conception of what the family should be and what the market should be. Her demonstration of the restrictive nature of analysis and experience based on this dichotomy can be applied to the patterns of change that have been presented in terms of marriage and its relations with property and law. Within those patterns there is evidence of the limitations of legal reforms that can do no more than try to make the

family more like the family - privatisation - or try to make the family more like the market - individualism.

RESULTING IMAGE

In this discussion of three tendencies found frequently in family histories, I have indicated some of the ways in which relations between marriage, property and law have become mystified. A failure to recognise variations between families, an obsession with searching for change within the family and a method of discussion that divides everything into pairs, contribute to the creation of a confusing and misleading image of marriage, which in turn influences its contact with property and law.

From the histories that I have discussed, the image that emerges of marriage has three main characteristics. There is a split between marriage and property. Marriage is an affective relationship, unconnected with property. Secondly there is a split between marriage and the outside world. In various ways, marriage has become a private relationship. Thirdly there is an increasing emphasis on individualism within marriage. The individuals have taken precedence over the community. By looking at methods of traditional historical presentation, the ways in which these characteristics have developed become clearer. They can now be used for the purpose of analysing continuing points of contact between marriage, property and law.

NOTES

- 1 M.Barrett and M.McIntosh, The Anti-Social Family, p.130.
- 2 The political and ideological background to law is discussed by S.Staves in the recent Married Women's Separate Property in England, 1660-1833. My intention is to point out the circular nature of ideology or images. Behind and surrounding, the legal reforms; changes within marriage, and developments in terms of property, there were political and ideological forces. These changes in turn gave rise to a specific ideology, a set of images, of marriage, property and law. The influence of these images is discernible within the continuing relations between marriage, property and law.
- 3 Heinemann English Dictionary.
- 4 See chapter 5.
- 5 J.Donzelot, The Policing of Families, p.4.
- 6 M.Anderson, Approaches to the History of the Western Family 1500 - 1914, p.14.
- 7 L.Stone, The Family, Sex and Marriage, p.10.
- 8 M.A.Glendon, The New Family and the New Property, p.104.
- 9 By significant assets I mean heritable property or income over and above the basic property that would be necessary for family survival.
- 10 L.Stone, op.cit., p.660.
- 11 A.Macfarlane, "The Family, Sex and Marriage in England 1500-1800," 1979 History and Theory, Vol.XVIII, 103, at p.109.
- 12 ibid., p.124.
- 13 ibid., p.125, quoting E.P.Thomson's review of Lawrence Stone's book at New Society, 8 September 1977, p.500.
- 14 M.Barrett, Women's Oppression Today, p.187, discussing Rayna Rapp, Ellen Ross and Renate Bridenthal, "Examining Family History," Feminist Studies, vol.5, no.1.
- 15 "legal history has most often been celebratory": S.Staves, op.cit., p.9.
- 16 J. Donzelot, The Policing of Families, p.xxv.
- 17 P.Aries, Centuries of Childhood, 1973, Penguin Books.
- 18 J.L.Flandrin, Families in Former Times, 1979, Cambridge University Press.

19 *ibid.*

Donzelot, himself, despite his apparent conviction of his own objectivity, may have been the victim of his own "pre-existing theoretical machiner[y]." His work, however, provides a means of highlighting the narrow and subject-centred nature of both legal and family centred histories and suggests a model which, if applied to marriage, property and law, might produce a more balanced picture of their relations.

20 L.Stone, *op.cit.*, p.14.

21 S.I.Benn and G.F.Gaus, Public and Private in Social Life, p.13.

22 F.Olsen, "The Family and the Market: a Study of Ideology and Legal Reform" (1983) *Harvard Law Rev.*, p.1567.

PART III
REFLECTED IMAGES

PART III

REFLECTED IMAGES

In Part II I have reconsidered the histories of Part I. It has been my aim to question the historical patterns that emerged by looking at the histories of law, marriage and property in conjunction and by recognising the limitations of their presentation.

History in this thesis has two functions. It provides, first, a background picture of change. Secondly, it is used to suggest that, beyond what may have been relatively narrow and specific historical changes, there is also created an image of change.

From the histories that I have discussed, the image that emerges of marriage has three main characteristics. There is a split between marriage and property. Marriage is an affective relationship that is unconnected with property. Secondly, there is a split between marriage and the outside world. In various ways, marriage has become a private relationship. Thirdly, there is an increasing emphasis on individualism within marriage. The individuals have taken precedence over the community. By looking at methods of traditional presentation, the ways in which these characteristics have developed have become clearer. They can now be used for the purpose of analysing continuing points of contact between marriage, property and law.

Having highlighted characteristics of an image that emerges from the isolated histories of Part I and having suggested why these mislead, I will proceed in Part III to consider their reflection in relations between marriage, property and law. The characteristics that have emerged will provide tools of analysis.

CHAPTER 7: PRIVACY

A common characteristic emerging from the historical accounts of both legal reform and marriage is the increasing privatisation of marriage and of the relations of husband and wife. Lawrence Stone points to the privacy of the modern nuclear family, its existence within a sphere of private regulation and its physically private setting. The legal reforms indicate a preference for private ordering of the domestic affairs of husband and wife. These accounts contribute to the characterisation of marriage and family life as private. Analysis based on a split between public and private has frequently been employed in discussion of families. The recognition of such a split is traditionally traced back to Aristotle, being later taken up and developed by liberal political theorists. More recently, it is a method of analysis which has been widely used by feminist writers, aiming to display the inadequacy of equality within the public sphere if accompanied by continuing inequality within the private. While not wishing to subscribe to a widescale form of this theory I would like to borrow aspects of it in considering some stages in the developing relations between family and property. I do not intend to develop a theory of marriage and property in terms of a public/private debate but to look at some instances in relations between marriage and property where privacy plays a part.

The foregoing historical discussions have contained evidence of trends towards the privacy of both marriage and property, and the withdrawal of law from these areas. The historical pattern of legislative reform, Stone's account of marital and familial developments, and changing types and concepts of property highlight the increasing importance accorded to the privacy of marriage and the family.

The historical discussion of legislative reform in chapter 2 charts an apparent move towards non-regulation by law of the property of husband and wife and of the property element of marriage. Abolition of the jus mariti and the right of administration signals an end of specific legal involvement in matrimonial property. Chapter 3, in dealing with historical accounts of the family and, particularly, in considering the family histories of Stone, suggests a trend towards a private family. Privacy is emphasised in terms of the marriage bonds - personal relationships and affect - and in terms of isolation of physical domestic space. Stone describes the closing off of the nuclear family, its confinement within a private domestic space and its increasing emphasis on the private personalities of its members. In chapter 4, in the discussion of the changing nature of property, there is also a growing emphasis on privacy. There is to be seen a move in family property from the assets of an extended kin group to the specific goods of a nuclear unit; a shift from assets with some form of wider public worth, for example,

land providing work, accommodation, farming etc. - to property of a much more personal value.

From these accounts, privacy has emerged in various guises. It is, as I have argued, a characteristic that may lead to unfulfilled expectations.¹ Privacy, nonetheless, remains as a dominant image of marriage. Being characterised as private may affect the connections which spouses, or the relationship of marriage, maintains with property and law. In this chapter I want to consider some of the elements of privacy that have been emphasised in terms of marriage and discuss how they are involved in aspects of relations between marriage, property and law. I have outlined historical accounts which highlight the private nature of marriage and the private nature of regulation of domestic affairs. I have also suggested that, to some extent, this characteristic of privacy is little more than an image. I intend now to use the idea of privacy, and its distinction from the public, as a means of analysing aspects of relations between marriage, property and law.

What does it mean to talk of a split between public and private? Although I do not want to be trapped within pre-determined limits of a public/private debate, an understanding is necessary of what others have meant when speaking of the privacy of marriage and families in opposition to the public sphere.

For Aristotle, there was a natural distinction between men and women which required that they be kept separate. Both had natural virtues but only men were capable of displaying the virtues necessary to create and sustain a good city. Only men therefore should participate in the life of the polis - the public. These early discussions of a split between public and private were closely linked to a sex-based distinction. When the public/private distinction was taken up and developed by liberal theorists, the male/female division was much less overt. By the late 17th century, liberalism, based on individual freedom and supremacy of contract, had apparently replaced a social structure based on patriarchy. Patriarchy had previously moulded all individual relations, within the family and in society. Society was,

"one long chain ... within which an endless cycle of command and obedience is repeated."²

Liberalism attacked the position that everyone is born in subordination to another and replaced it with the theory that every man is born free.

How could this collection of free individuals live together and co-operate in society? In explaining how free individuals could live together and avoid anarchy, the distinction between public and private was important. It was within private that there should be complete individual freedom. Within the public it was necessary for these

individuals to act as one - to form a society. For Locke, the split within each individual was between reason and desire. Reason was something that each man knew equally and it would therefore guide his public actions. Desire was personal and individual and was allowed to govern fully only in private.

"In our public mode of being we speak the common language of reason ... In our private incarnation, however, we are at the mercy of our own sense, impressions and desire."³

The existence, within liberalism, of a distinction between public and private is certain but there is less agreement as to which activities fall within each sphere. Political activity is firmly placed within the public whereas the setting of economic and commercial affairs gives rise to some debate. Ownership is considered as private, although there might be, for example, private ownership of property that is intended for public use. Although the setting of particular matters may be uncertain, it is clear that everything can be placed within one of these two categories. Whatever doubts might arise about the private or public nature of matters such as business and commerce, marriage and the family are quite distinctly private.

The distinction between public and private was developed further in the writings of J.S.Mill and it began to take on a clearer content. There was an increasing tendency to think of the split,

"in terms of the division between home and market ... with the opposition between the realm of legitimate public regulation and the realm of freedom from intrusion, personal autonomy and private choice."⁴

Recently, the public/private split has become an important theme of much feminist writing and action. This work centres around the need to recognise the split between public and private and its significance in maintaining a patriarchal structure. Much recent feminist analysis is,

"directed at the separation and opposition between the public and private spheres in liberal theory and practice."⁵

It is argued that equality is impossible to achieve without consideration of the interlinking of public and private, an argument that has been popularised under the slogan of "The Personal is Political."

Much feminist writing is also engaged in deconstructing liberal thought by demonstrating its failure to recognise women as full public individuals. It is essential to liberalism that each individual has two aspects - public and private. Each individual has the potential to act within these dual spheres. Feminist argument attempts to demonstrate that this dual nature was not intended to extend to women. When liberalists spoke of individuals they often avoided the issue of whether that term was to include women. Mill, although he campaigned for the extension of

full political freedom to women, continued to envisage the home as their natural and primary sphere of occupation.

While some of these arguments are inherent in my discussion of family privacy, I do not want to be constrained solely within these boundaries. The image of marriage and property as increasingly private elements owes much to liberal thought. Feminist analysis of liberalism contributes significantly to an understanding of some of the conflicts that arise in the relations between marriage and property. The ideal of privacy, however, has other applications in terms of marriage and property.

In using the terms private, privatisation, privacy, my understanding of them may differ from classic public/private arguments and the meaning attributed to them may change when applied to different areas of discussion. Privatisation of the family from a legal viewpoint may mean non-regulation or limited regulation of the family by law; in terms of property, privatisation suggests physical privacy - the family home - or the personal nature of the family's assets. In another sense privacy of the family may describe the apparent lack of social significance attached to the marriage relationship - a decreasing emphasis on status and an increasing emphasis on private emotions and relationships. In economic terms it describes the split between production and consumption. An understanding of how privacy became important in these various contexts and of the results of the interaction of these aspects is my aim

in this chapter. I would wish to demonstrate in some ways the increased emphasis on privacy in the family and the significance of this emphasis and characterisation in view of the differences between it and the public domain; to consider the idealisation of privacy in relation to the family and some of the conflicts which arise because of the perceived split between public and private, particularly in the context of property.

THE UNREGULATED FAMILY

Neither public nor private is fixed nor do they correspond consistently to male/female or property/family. In one sense it can be argued that family and property are private: they are ideally matters of individual regulation not subject to legal interference.

"In classical liberalism both property and the family lie in the 'private' domain, where state and law should not enter."⁶

Thus it can be argued that there is an apparent conflict between 'public' law and 'private' property and family. O'Donovan concentrates on this aspect of the public/private split in her image of the family as a "black box,"⁷ an area into which law will not intrude. I would suggest that this is an image, a split between public and private, which is more effective ideologically than the facts would seem to justify. The image may remain of the desirability of private regulation in these areas but they are in reality

quite clearly accessible to law and state.⁸ Intervention, however, continues to be portrayed as the exception, the abnormal. A study of the Married Women's Property reform legislation contributes to this image of deregulation of the family, although, as has been previously argued, regulation may only have shifted rather than disappeared. The portrayal of the family as legally unregulated, whether or not that image is upheld in practice, is I would suggest an important aspect in the study of family and property relations.

Ironically the privacy of marriage, its non-regulation by law, has been and continues in some contexts to be threatened and disturbed by the privacy accorded to and emphasised in other aspects of the modern nuclear family - for example, physical privacy. In particular I will discuss three aspects of family and property relations which demonstrate some of the conflicts arising from the uncomfortable cohabitation of marriage and property, influenced and divided by the terms public and private: the conflicting values of public and private as evidenced by the disparate position of women emerging in the nineteenth century in the two spheres of public life and private family, the unbalanced effects of liberal theories in relation to public and private endeavours, and the creation of the goal of the private family home, with the horrible secrets which this goal can produce if misused. The first two aspects demonstrate the conflict between public and private. The third is the most obvious and

dangerous example of the potential undesirability of the idealised image of a private family. In each of these scenarios I would aim to give some indication of the way in which the private element was stressed and maintained; to demonstrate how that element can come into conflict with public aims and values - perhaps by being abused; to consider the interaction of these private elements with the apparent unwillingness to allow legal intervention and to indicate in what circumstances and by what means the law will intervene.

PUBLIC/PRIVATE POWER

In discussing legislative reform and the changing image of marriage it has become clear that by the 19th century the two were quite seriously out of step. Disparity could be seen, in particular, in relation to wives. While many women had risen from a position of complete submission, according to the law they remained quite firmly merged with the persona of their husband. The existence of a wife was tied very closely to the existence of her husband and her familial duties. A married woman existed by means of her role as a wife or mother rather than on the basis of her individual merits. It has been seen from considering the system of property regulation that a woman's property, to which she may have become entitled by reason of her marriage, was merged in the property of the family and in many ways she would have no independent right of ownership or control over it.

By the late 19th century the private balance of power, so clearly evidenced by the common law of property, under which virtually all rights to a woman's property vested in her husband, was no longer widely acceptable. Increased public economic activity of women and general trends of political, economic and philosophical thought were highlighting the anachronisms of the private relationship. The influences of liberalism favoured individualism and personal equality. The upsurge of romance highlighted the role of companion for the wife in an affective marriage. Neither of these accorded well with the gross inequality of property rights in marriage and of the wider concept of marriage as an extreme example of female subordination.⁹ These anachronisms were to a great extent emphasised by a contrast, within the existence of the family, between public and private in terms of family economics.

By considering specific aspects of the Married Women's Property legislation I would suggest that the importance and the influence of a public/private split becomes evident. Before discussing some of the conflicts and problems to which the split gave rise and the specific legislative reforms which were introduced I intend to consider how this division might have occurred or how the perceived division was strengthened.

Changes within the family and isolation of the family are sometimes explained as being the consequence of change in the public sphere. Whilst broadly rejecting functionalist

theories which portray the family as a direct product of the changing social or economic structure, I would agree that these external shifts are significant as one influence of change within the family. To argue that the modern private family occurred as a result of industrialisation, or that industrialisation required that particular family form, is to create a seemingly straightforward exchange which exists neither factually nor logically. While there are obviously points of interdependence between industrial capitalism and the modern nuclear family, family relationships are the product of a much more complex and fragmented system of influences and requirements. Industrialisation and the modern capitalist structure, however, did various things which were of significance to family form and to the relationship between family and the wider society.

Historical data disputes the assertion that gender roles and division of labour emerged simultaneously with industrialisation. It seems reasonable to suggest that to some extent these differences existed long before the 19th century. With industrialisation, however, they became much more clearly defined and their effects became of greater significance. I would argue that a split in physical terms between public and private can be attributed partly to industrialisation and a changing work pattern.

The pre-industrial family is often described as forming an economic unit of production; it is seen as a partnership,

albeit unequal, of husband and wife. Work was part of the family tasks often being shared amongst its members. Some things such as housework and childcare always tended to be the domain of women, but for the family of earlier times such matters were of considerably less importance than they are to the modern family. In addition, although such tasks were identified as women's work, the woman was not necessarily the wife or mother, but may have been a neighbour, servant, daughter or other female relative. Thus while there may have been gender differentiation in family roles prior to industrialisation, it was not a matter of equal import as neither role was specialised to the extent that it is in the modern context and, in terms of physical space, the tasks of each sex were not necessarily or commonly separated.

Industrialisation first moved all adult members out of the house and into the mill or the factory but gradually with increasing prosperity the women and children were sent home.

"At some point in the nineteenth century ... the family wage emerged as an important bargaining point for the trade union movement and with it came the idea that, ideally, the wife's place was at home."¹⁰

An important change accompanied the introduction of a family wage, or the promotion of it as an ideal. It was no longer essential, or desirable, for all members of the family to devote their time and labour to supporting

financially the group. One member could now earn a family wage, thus freeing the others to concentrate on the family itself. While in theory all were working for the benefit of the family, tasks could be divided between waged labour and purely family based, private labour. To be able to afford to keep a wife became a sign of status for men. The move towards keeping women at home was also encouraged and increasingly necessitated by the growing emphasis on domesticity and revolutionary ideas in childcare. With the rise of the child as a principal object of family activity so the tasks and the time of the wife and mother became more precious and desirable. Thus developed the pattern of male breadwinner and female housekeeper. Both, it can be argued, now performed vital but different roles for the benefit of the family. Each, however, was acting in a distinct sphere which attributed different values and the conflict of these values can be seen within the confines of marriage and property. There was,

"a division of labour whereby one spouse works [in public] for earnings and the other [in private] for love."¹¹

While recognising and glorifying the position of the woman in the family she was, in the process, effectively being denied access to public life. Ideologically it was desirable for her to be at home. Physically, industrialisation made the combination of work in the home and the factory difficult. The spatial separation of work and family tended to confine the woman to the private

sphere of the home and to some extent, or at least for some time, it removed the man from the home.

What was the significance economically of the spatial division of the family from the market and of the confinement of women to the home? I would suggest that an important consequence was that there was now considerable potential and, in legal terms at least, justification for selfishness in relation to property. What greater incentive was there to work than the knowledge of the subsequent acquisition of one's own property? Property had increasingly become something that men acquired in return for their public endeavour.¹²

These changes in family structure and purpose developed ahead of the ever lagging legal reform. The property laws of the pre-industrial period were designed with a particular family and property system in view. It was a system in which property would tend to be donated on behalf of both spouses¹³ and in which personal rights and control were not entirely unfettered nor even desirable. It was a family form existing in a society where property was not directly connected to labour. It was a system in which inheritance and marriage were important means of acquiring property.

Thus there was a possibility of conflict between the emerging modern family and an increasingly inappropriate and anachronistic system of law. There was a potential

conflict between a legal system which treated husband and wife as one person, possessed of a relatively well-defined fund of family property, and an economic and family system moving towards a strict division of roles and activity between public and private, with a tighter link between individual and property.

Having sharply divided the family from public life and identifying the former with the female and the latter with the male, what would now be the effect of either party stepping outwith their gender specific role? Two problems are foreseeable: one, where the husband fails in his role to the detriment of his dependants and two, where the wife exceeds her role by moving outwith the private.

Change in, for example, production, ownership and economic structure had resulted in the likelihood that the bulk of a family's property would be the produce of the husband's labour, as opposed to the agreed and balanced contributions of husband and wife and their families. To some extent the creation of the husband as breadwinner and supporter of the family meant that the economic fate of the wife and children was being placed in the hands of a single man. Thus if the husband now failed in his familial duties the outcome could cause considerable hardship. This emphasised the fragility of the wife's position within the marriage.

For the 19th century wife, marriage meant complete submergence in her husband's legal persona. With the

teachings of puritanism, the cult of domesticity and the birth of the child centred family, her homely domain was given an almost saintly aura and appeal. In a modest way her endeavours were recognised and their value to her husband and family rewarded.¹⁴ Outwith the narrow confines of this sphere, however, her power and status were strictly limited. She dealt vicariously with the outside world, being legally represented by her husband.¹⁵ A wife and home were status symbols for a man but for a woman, a husband was often a practical, economic necessity. For her existence within the private sphere, a woman would be dependent on her husband's financial provision. Without the safety net of a marriage contract and without the certainty of inherited or contributed wealth, what guarantee did a wife have of continuing support from her husband?

What if the wife herself was to venture outwith the confines of the domestic sphere? Could not that provide one solution to her position of dependence? The possibilities for female work outside the home had increased, although they were still limited and unlikely to produce an income sufficient for comfortable existence. Female occupations prior to industrialisation had tended to be restricted to the familiar areas of dressmaking, millinery, the provision of accommodation and shop keeping. While female entry to gainful employment was clearly limited, it was nonetheless an important factor in the economic structure of some households and it could provide some financial security for women.

More discouraging, perhaps, than the restricted range of employment available, was the highly unjust and economically inappropriate method of legal treatment of married women's earnings. Under the common law regime, any income of the woman would fall within the scope of her husband's property rights.¹⁶ The source of such property was not of itself sufficient to dislodge the long established claim of the husband. The personal link between worker and reward gave way to the superior right of husband over wife. Ideally, of course, the husband's duty was to deal with it, as with all other family property, for the benefit of the family. So long as he did so then practically the effects of the law might pass largely unnoticed. The inequities of the system would become obvious where the husband, having become entitled to the property or income earned or acquired by the wife, then failed to support her. Where the woman had access to some form of self acquired income and her husband was failing in or neglecting his role of support towards her (and their children), there seemed just cause for change in the law.

Kahn-Freund discussing the legislative reform in England said that,

"the mediaeval common law ... took no account of the needs of married women who were gainfully employed outside the house, and who through their own earnings contributed to the maintenance of the family."¹⁷

In Scotland, in a similar way, only those women who had the benefit of a marriage settlement would have any independent right to property but that in any case was a method originally devised to secure the rights of women over inherited property. It was part of the old system of property whereas the question of a woman's right to enjoy the fruits of her own labour was an aspect of the modern form of family property.

Theoretically the denial to women of the enjoyment of the product of their labour was an increasingly impossible position to justify. It contradicted an economic system which now recognised a close link between work and reward, and a loosening and fading of the old ties between property and inheritance.¹⁸ From a practical, economic stance it was pointless to deny to women what, in the face of lack of support from their husbands, would be their only or at least their most obvious and reasonable form of support. Thus, on both a theoretical and a practical level, the position of the wife working outwith the private sphere of the family questioned the continued operation of the common law rules.

When change finally came in legislative form, one of the first areas of married women's property to be exempted from the control of the husband was the independent earnings of the wife. The Conjugal Rights (Scotland) Amendment Act 1861 provided for the exclusion of property acquired by the wife by her own industry, where she had been deserted by her

husband or where she had obtained a decree of separation¹⁹: a provision to fit exactly the two routes described above by which spouses might diverge from their divided public/private roles.

This, in terms of a changing attitude towards matrimonial property, was a limited step as it was in fact dealing with a situation of marital breakdown. In terms of the public/private distinction, however, it was a recognition that the changing economic base of society could conflict with the private lives of family members. It dealt with the most unfair example of the conflict affecting the woman maltreated in the private sphere and also denied her due reward in the public sphere. Her husband, by deserting her, had failed in his duty as supporter and in this situation there could be little justification for further depriving the woman, by denying her the fruits of her public labour; nor would such denial make economic sense.

The provision was however very limited. The privilege granted by the reform would last only for so long as the spouses remained apart. In this situation the ideal roles of male provider and supporter and dependent, private wife were sacrificed to the needs of economy. Without seriously disturbing the promoted familial roles the legislation exempted from the general rules one problematic area. Thus the basic position would appear to remain that the woman's first source of support should be her husband and in return she should surrender the care and control of her assets to

him. Where, however, such support was not forthcoming and the wife showed willing and able to support herself, then to prevent her from doing so would be philosophically unsustainable and financially unwise.

With the Married Women's Property (Scotland) Act of 1877 the protection for wages and earnings was extended to all women still living in matrimony. The jus mariti and right of administration were excluded in terms of s.3 of the Act-

(1) From the wages and earnings of any married woman acquired or gained by her after 1st January, 1878,

(a) in any employment, occupation or trade in which she is engaged, or

(b) in any business which she carries on under her own name.

This provision protected the income from a woman's employment but did not affect any stock in trade she might have which would continue to be governed by the common law rules unless it had been gifted to her by her husband. Thus adequate protection was given to ensure that the wife could benefit from her income which might provide a barrier against poverty, particularly in situations where the husband was unwilling or unable to provide for the family, but there was no substantial attack on the basic underlying policy of granting control or ownership to the husband.

From the nature of these two statutory provisions I think it can be seen that they were to a great extent piecemeal

provisions designed to adapt the outmoded law to deal with particular problems. The restriction of the earlier provision to those situations where the couple were no longer living together demonstrates an unwillingness to interfere with the basic system and to disturb the private roles of husband and wife. It was designed to protect a wife's public enterprise only where her husband was failing in his private duties. The later provision, by dealing solely with the income, also shows an unwillingness to disturb the common law any more than absolutely necessary and I would suggest highlights the ad hoc nature of the provision, rather than suggesting it as a component of a more wide scale and comprehensive pattern of reform.

These provisions are a reflection of one of the conflicts which emerged from the strict separation of private family from aspects of public life. In theoretical terms the split highlighted the oppressive and inegalitarian nature of the family hierarchy. This was an influence which was of ongoing importance to the legislative reforms of the property system, to changing attitudes towards the family and to behaviour within it. In a more concrete way, the physical split between public and private, and consequently between the promoted spheres of work and existence for male and female, contributed to, and perhaps forced, the reform of aspects of the common law. The legislation was adequate to protect, the wife who was mistreated in private from being doubly prejudiced by being denied both private support and the public means of support ie. waged

employment. Later, protection was extended to all women who sought to supplement their own or their family income by working outwith the home. The protection was afforded, for a few years at least, without substantially disturbing the continuing private control of marital property.

To have allowed the system to continue unaltered might have lessened the willingness of women to conform to marriage and have raised wider questions of equality and, yet, to have weakened the husband's basic powers would have undoubtedly been met with considerable disfavour and opposition.

PRIVATE REGULATION

As briefly mentioned above, one aspect of the public/private discussion which is often highlighted is the apparent split between the family and law. The family is argued to be a legally unregulated area. It is on this aspect of the public/private split that Katherine O'Donovan concentrates in her book, Sexual Divisions in Law. She demonstrates the continuing inequality of women, stemming from the non-regulation of familial relationships. While this is a contention which I would dispute, I would suggest that the characterisation of the family as such a sphere of non-intervention is influential in its existence and in the way it is controlled. The portrayal of the family as non-regulated contributes to the split between public and private, by emphasising the family as something natural,

uncommercial - a collection of all the good things which modern public life has lost or forsaken. In Stone's account, we witness the demise of a regulatory system that suppressed individual personalities and, with its demise, natural feelings are allowed to flourish.

I would suggest that there are two problems which arise from the image of the family as legally unregulated. Firstly, it contributes to a false image of the family as something complete and separate and denies to the members the legal remedies and rights available in public life. Secondly, because of the concrete split between public and private as suggested above, and particularly as it affects sexual division of labour, non regulation, which is presented in terms of liberal public life as being a benefit of the family, may in practice disadvantage some members of the family. It is the link between these two aspects which can produce unfair and prejudicial results for one spouse. As O'Donovan summarises the problem:

" law leaves it to the couple to sort themselves out in private; but dominance within personal relations is determined by structures external to the family."²⁰

The whole question of the regulation or non-regulation of the family involves vast and diverse areas of legislation relating to, inter alia, welfare and social security which to a large extent remain outwith my sphere of consideration.²¹ For many families, talk of legal intervention and control is of a hypothetical nature. State

intervention instead has become much more of an issue for them. Through the system of social security and through a chain of connected social control agencies, state intervention and support have become, perhaps, more significant than the question of the intervention of private law. While recognising that much of the control and regulation of familial matters is now located in laws not so obviously or solely devoted to the family and, therefore, as previously discussed in relation to Stone, regulation has diversified or shifted rather than disappeared, my concern here is to consider the image of legal non-regulation of the family and, more specifically, family property.

The Married Women's Property reform legislation of the 19th and early 20th centuries to a large extent contributed to the creation of the non regulated image of the family and its property. With the completion of the reforms, law appeared to withdraw from the arena. Under the resulting system (or absence of system) of separation of assets, law retained no right to interfere during a marriage. It reserved and has developed considerable power over property on the breakdown of marriage. Unlike legal systems which operate by means of a comprehensive code, the separation of property in Scotland was rather the result of a series of individual reforms than the considered application of a complete scheme. What then were the combined effects of the physical split between public and private - the separation of workplace and home - and the more theoretical split

which separated law from marriage and property? The result of the Married Women's Property reform legislation was to abolish the peculiarities of regulation previously applied to property in terms of marriage. In other words, the laws of property would now apply apparently equally to all, regardless of marital status.

In the absence of any specific rules or guidelines to be followed in relation to property within the family, the rules of ordinary property law fell to be applied. These rules were formulated in the atmosphere of liberalism and free market thinking which was prevalent in the public sphere. While liberalism was a welcome alternative to the oppressive paternalism that had preceded, it must be welcomed with the warning of double standards. Its presence in the private sphere of the family was a very watery version of what existed in public and it introduced a philosophy which was contradictory in many ways to the ideal family form. It encouraged individualism in an institution based on merged personalities. It appeared to introduce the principles of equal treatment and freedom of contract and will to a group comprising highly unequal members who were accustomed to submerging their individual will to the common good of the group.²²

For the law to withdraw from regulation of matrimonial assets was apparently in keeping with the general liberal aim to protect property, to the greatest practical extent,

from legal intervention. This policy in tandem with the concrete split in spheres of activity which was prevalent in many modern families meant, however, that its consequences within the family setting were often unfair and far removed from the desired effect developed and envisaged in the public commercial sphere.

It is this aspect of liberalism and the public/private dichotomy that has attracted feminist analysis. Non-regulation of marital and familial affairs was a benefit in terms of liberalism; granting to the individual a private domain within which to be oneself, to act free from legal constraint. Liberalism, however, posited this private domain as a balance to the public sphere of activity. How would the non-regulation of the private sphere affect those who had no existence within the public?

"Conventional analysis by legal writers presents a picture of a linear progression by emancipated women out of the private sphere into the public."²³

Stages in this progression included the granting of suffrage to women and the changes in the legal rules governing the property of married women. Women too could participate in public life and they were to be given the consequent powers, such as the power to own property. There is much to suggest, however, that many women remained one dimensional - they remained purely private. Female vision showed little desire to enter the public, with even those who campaigned for suffrage doing so on the basis that the

political would benefit from private feminine values. Women would bring their natural morality to the public sphere of immorality and reason. Opportunities to participate fully in public affairs were limited, with women's entry to education and the professions being severely restricted. Domestic ideology encouraged women to remain in their private domain. Simply by giving to women equal public rights did not guarantee that they would become fully participating members of the public. J.S.Mill, for example, assumed that women, given freedom of choice, would continue to choose to remain within the familial sphere.²⁴ The majority continued to be private women, who now had the power to engage in one public activity, that of voting.

The private family was presented as a liberal ideal but it was an ideal only for liberal individuals and that did not necessarily include women. Feminist analysis of liberalist thinkers argues that their theories were not intended to extend to women. Liberalism allowed men to further their own interests within the privacy of marriage and the family. That, in effect, left them free to maintain a structure of patriarchy within their own family. Patriarchy, which had apparently been overthrown, continued to flourish within the private family and it was able to do so because,

"the dichotomy between the private and the public obscures the subjection of women to men within an apparently universal, egalitarian and individualistic order."²⁵

What exactly did the legislative reforms relating to the property of married women achieve? They replaced a system of property grounded in hierarchy and strict control with a system of freedom and self regulation. They removed a set of rules designed for an outmoded social structure and left in its place the private autonomy promoted by liberalism. They failed to allow for the continuing anachronism of marriage - the private refuge of patriarchy.

More specifically, the legal reforms extended to all women the protection which Equity (in England) or marriage contracts might have previously afforded, making individual arrangement no longer necessary. In other words they provided for the retention by women of their own assets regardless of whether or not they were married. Just as those women who would have benefited under the early provisions, concerning income from employment, were women already participating to some extent in the public world, so too those who would previously have sought legal protection, by means of marriage contract, were women who already had some claim to a position in public society as property owners. Thus the legislation only extended to all women, a system of protection that was already available for women who owned property of their own. It did not consider, or at least it declined to provide for, those women who had no actual assets of their own - women who only had a private existence and who had no direct means of access to property through the marketplace.

Unfairness and unexpected results may flow from treating those with a purely private existence as if they also had a public being. The legislation treated women as dual persons by applying to them the same rules and standards which applied in the public sphere. It treated them as liberal individuals - a categorisation which may never have been intended. It introduced a specific system devised to benefit those who existed publicly as well as privately and it was broadly based on the popular public notions of individuality, equality and freedom. On both counts it overlooked the wholly private woman.

Lenore Weitzman provides one concrete example of the practical unfairness of apparently equal rules when applied to women existent only in the private sphere, in her discussion of the "divorce law revolution" in some American states. She discusses the introduction of no-fault divorce law and the irony that rules devised to treat both spouses equally have in fact economically deprived many divorced women. These rules, which assume the existence of spouses who are equally adapted in economic terms, introduce,

"new norms for dividing property ... [that] eliminate the anachronistic assumptions in the traditional law and treat wives as full and equal partners in the marital relationship."²⁶

In Scots law the continuing conflict between public and private spheres of activity has again emphasised the failings of the present property system. The law appears to

treat men and women equally in relation to property but in a similar way to that discussed by Weitzman, a gender neutral, matrimonial property policy may produce inequitable results.

Removal of legal constraints on female ownership of property was in line with the entry of women to the labour market as discussed above. Non-interference in the relations between individual spouses and their property accorded with liberalism and modern notions of ownership. The legislative reforms, however, did not tackle the separation of home and work, the split between public and private and the distribution within the family of the income and assets of the economically active partner.

As previously discussed in the changing nature of property,²⁷ assets and income were now more likely to be the produce of individual labour rather than inheritance or marriage portion. Such remunerated labour was also much more likely to be the husband's or at least his share of it was likely to outweigh greatly that of the wife. It is against this background that the apparently just and equal treatment of property within marriage must be considered.

"This property regime of 'to each her own' focused on legal forms of subordination but leaves untouched questions of power and economic distribution within the family."²⁸

Although female employment was highlighted as one cause behind the legislative reform, that occupation was still

limited and its importance was to a large extent overshadowed by the emphasis on domesticity and the role of the wife as homemaker and mother. The Married Women's Property legislation did not only signal the end of legal regulation on an automatic basis it also heralded an antipathy towards legal interference in all domestic matters. In particular in relation to property and private economic arrangement, the characterisation of the family as a sphere into which law should not enter meant a reluctance to give legal sanction to private agreements. The case law is well rehearsed of judicial reluctance to enforce private contracts between spouses on the basis that they are domestic agreements and not intended to have legal force.²⁹

"Natural love and affection are judged unsuitable for legal regulation ..."³⁰

Easier divorce and the tendency of financial provision on divorce towards a clean break principle and towards provision for a period of readjustment rather than lifetime support, considerably weakens the position of the completely private wife who may question the detriment she suffers as a result of attempting to fulfil her ideal role.

The sometimes harsh effects of separate property, of an apparently equal treatment of husbands and wives, was recognised to some extent in the Family Law (Scotland) Act 1985. It admitted that legal equality may not produce equitable results when applied to persons who have existed

in separate spheres. It had become clear that a strict separation of property could lead to disadvantage, particularly in relation to women who had devoted years of their married life to unpaid domestic work. In considering what changes might be made, the Scottish Law Commission reviewed the whole system of separate property and the possibility of adopting in its place some form of community. They concluded that the main point of significance, in terms of who owns the matrimonial property, is the breakdown of a marriage.³¹ While a marriage exists, ownership of matrimonial goods is rarely a matter of concern. Therefore, they decided that the non-interventionist separate property system should continue to operate throughout the relationship, provided that there was adequate provision for fair sharing of property on divorce. The Family ¹(Scotland) Act reflected the conclusions of the Commission.

The main scope of its provisions relates to financial provision and sharing of matrimonial property on divorce. What happens on divorce does not fall within the scope of my study but it may be noted that the provisions for dividing property on divorce reflect the conflict between public work for money and private work for love which can exist during marriage.

Section 9 sets out principles which shall be applied by the court in deciding what economic adjustments should be made between spouses on divorce.³² The first is that, "the net

value of of the matrimonial property should be shared fairly between the parties to the marriage." Section 10 provides that matrimonial property will be taken to have been shared fairly "when it is shared equally." Therefore, on divorce, separation of property is in most cases to be abandoned. The starting point is to be that spouses share equally in the fund of matrimonial property. Special circumstances, such as an agreement between the parties as to an alternative scheme of division, or the source of a particular asset, may justify departure from the principle that fair sharing means equal shares. On divorce, therefore, the courts are not bound by separate property rules; they are not bound to award assets only on the basis of strict legal ownership.

The starting point is a fair sharing of matrimonial property but the court may also make an additional order of financial provision. The principles in s.9, which they must apply, expressly direct the court to take note of the public/private split between husband and wife. Paragraph (b) of s.9(1) provides that the court should take,

"fair account ... of any economic advantage derived by either party from contributions of the other, and of any economic disadvantage suffered by either party in the interests of the other party or of the family."

Section 9(2) makes the aim of this principle clear by defining "contributions" to include

"indirect and non-financial contributions and, in particular, any such contribution made by looking after the family home or caring for the family."

Thus on divorce, the private contributions of a spouse must be taken into account and may be enough to secure a share in the family's publicly earned wealth.

The provisions of the 1985 Act, as they relate to financial settlement on divorce, could be argued to have introduced a form of "deferred community" of property. This can be seen as an attempt to evaluate in economic terms, the non-financial contributions to a marriage and as an attempt to rebalance the economic strengths of both spouses, in particular where one has been financially active and the other has been purely devoted to the private family.

During the existence of the marriage, however, the Family Law (Scotland) Act upholds separation of property.³³ It continues to maintain a separation between marriage and legal regulation. Section 24 of the Act reaffirms that marriage itself will not affect the rights of spouses to their property nor their legal capacity. Thus the benefits gained by means of the Married Women's Property reforms are not to be lost. The legal advantages of the separate property system require to be considered in the light of its application and separate property ought not per se to be greeted as desirable. In dismantling the previous regime a system was introduced which had no regard for the economic imbalance of the spouses but rather assumed that

the application of rules on an equal and gender neutral basis would have equal results. For the reasons outlined above, in particular the split economically between public and private and the coexistent reluctance to allow legal regulation of private ordering of property and finance, such equal results have not always been achieved.

A slight disturbance of the strict separation of assets is effected by s.25 of the 1985 Act which introduces the presumption that household goods are equally shared. This would seem directly designed to accord with the belief of most couples that they jointly own household effects.

"Most married couples in fact share certain types of property and regard them not as 'his' or 'hers' but as 'ours'." ³⁴

The presumption in s.25 recognises this commonly held view. It provides that in respect of the,

"rights of ownership of the parties to a marriage in any household goods ... it shall be presumed, unless the contrary is proved, that each has a right to an equal share in the goods in question."

In relation to the whole economic imbalance of many relationships its significance is extremely minor. The presumption of equal ownership applies only to "household goods" which means "any goods (including decorative or ornamental goods) kept or used at any time during the marriage in any matrimonial home for the joint purposes of

the parties to the marriage." It is however some recognition of the highly disfavoured position of many non-earning spouses under the present marriage and separate property system. It is a system which did not even give the non-earning spouse a share in the domestic goods which furnished her private sphere.

By introducing the method of a presumption the provision can be directed towards those whose interests it was intended to protect while leaving largely intact the basic separate and non interventionist property system. This provision represents an exception to the rule against special treatment for the property of spouses; a cosmetic measure perhaps, designed to forestall more fundamental questioning of the regime.

PRIVATE ABUSE

In the above discussion I have considered the importance of a split between public and private in terms of family roles and economy and in terms of legal regulation. I now intend to consider the importance of a split in relation to physical property and in particular in relation to the specific asset of the family home. Whereas the problems outlined above have resulted from conflict between public and private, the problems in relation to the matrimonial home are more easily understood as resulting from abuse of privacy. As with the presentation of the private sphere of domestic activity and the legally unregulated area of the

family, so the private matrimonial home is apparently a great benefit conferred on the family. Its nature in practice can be extremely ambivalent.

In physical terms the privacy of the modern family can be regarded as being symbolised by the home, the private domain of the nuclear family.

"The ideal of happiness has ... taken material form in the house.³⁵ it stands for permanence and separation from the world."

Over the last two centuries the structure of the relation between one family and one home has gradually become more significant and more prevalent.

"Thus in the nineteenth century, although owner-occupation of the home was not unknown and indeed became much more common in the course of the century, there was by no means as firm a link as today between ownership and occupation of the home."³⁶

Houses would at one time be regarded primarily as part of the family estate. Their significance stretched beyond the simple provision of accommodation for the owning family. House ownership was one aspect of landownership and, for the propertied classes, houses would represent another source of income in the form of rents. The changing rules of inheritance, the gradual diminishing of the private rented sector, the growth in house building and the greater accessibility of house ownership to a larger sector of

society all contributed to the more widespread emergence of the family home.³⁷

The family home can be seen as a concrete symbol of the emerging split between public and private, between family and commercial life, as described above. It was in the family home that the private family life existed. In terms of property, the home was the most important example of private family property - an asset linked specifically to one family; in terms of privacy from the law, it represented the sphere of private control into which law would not trespass and in terms of the spatial split of work and family life, it provided the physical space in which the private was situated - normally the domain of the wife. The surge towards home ownership was hailed as allowing to each family the individual privacy of the family home and an area of personal regulation beyond the reach of legal control. The accuracy of that claim to freedom can be disputed and there is also evidence that in the creation of the private domestic sphere new forms of control emerged.

The home was significant in the privatisation of the family in that it provided a physically segregated area for each family and also in that it provided an occupation for the unemployed wife. The home became more than a simple shelter for the family, it became the woman's domain, her responsibility and her work. With the gradual and continuing process of the extension of home improvement to

all classes and with the moves towards a more reasonable family wage, the woman was freed to devote her time to tending the home. As domestic conditions improved, so standards of cleanliness, tidiness and thrift were expected from the wife. With the increased emphasis on the home and domesticity, so the role of the wife was more clearly defined. Thus the family home was significant in the split between public and private labour in that it encompassed the main area of private work and concern associated normally with the wife.

In purely physical terms the family home was also of great importance in relation to the increasingly private nature of family life. The nuclear family would find in the family home a sphere of private existence, in relative isolation from kin and community. Clear distinctions emerged between family and non family. Previously a household might comprise family members, a wider group of relations and possibly servants and apprentices. It now became much more likely, amongst those of the middle and upper classes and to a lesser extent amongst the poorer sections of the population, that living accommodation would exhibit barriers between family and servants and even between members of the family group itself. Stone described some of the architectural examples of division and isolation.

"The great houses of the fifteenth and sixteenth centuries had been constructed of interlocking suites of rooms without corridors, so that the only way of moving about was by passing through other people's chambers. In the late seventeenth and eighteenth centuries, however, house plans

allocated space to corridors, which now allowed access without intruding on privacy."³⁸

While conferring greater privacy on individual family members Stone also emphasises the importance of these developments in segregating family from non family members of the household. In his later discussion of the "companionate marriage" he highlights two important aspects of the eighteenth century house (of the elite) - the corridor and the dumb waiter. The corridor in particular was important removing as it did,

"the ever present and inhibiting threat of a stranger walking through one's bedroom to reach his own room."³⁹

These beginnings of physical segregation can be seen to become even more detailed and specific, in particular in the separation within the home of male and female domains. For the men there were billiard rooms, smoking rooms, libraries and gun rooms, while for the women there was the boudoir and the dressing room.⁴⁰ There was also provision for separation of family and servants, adults and children.

Within the boundaries of this private sphere the family was apparently to exist free from sanction and legal or social control.

"The cult of domesticity and beliefs in family harmony and bliss made the idea of outside intervention in domestic affairs seem a needless violation of the sanctity and privacy of the home."⁴¹

In the process of creating this sphere of privacy, however, the possibility of new channels of intervention were secured. With the increased importance attached to the family home and the greater free time of women, the emphasis on the domestic sphere grew. Donzelot considered the significance of the cultivation of the domestic sphere and of the female role of good mother and thrift conscious, houseproud wife and the ways in which she was used to introduce new means of control into the family.⁴² The condition of the family's living quarters was regarded in some ways as an indication of their conformity and of their moral rectitude. While the home was shut off from the prying eyes of neighbours and relations and the interference of the law, it was opened to the controlling force of the welfare agencies. Whereas previously the controls had been of a more administrative nature - regarding the formation of marriage, the legitimate birth of children, the control of property - they now centred on the very existence of the family. In setting standards for the cleanliness of their home, their morals and their health, a whole new set of potential failings was introduced for the control of which intervention was possible and permitted. In the raising of domesticity as a goal of the private family, greater potential for shortcomings and deviance was created in the existence of the family, thus legitimating outside control. The new sphere of the domestic opened up to replace the more traditional objects of regulation - choice of spouse, property control and transfer. Regulation of the family

could be disguised in the model of privacy while simultaneously rejecting the more obvious intervention of law.

In terms of ownership, however, law remained firmly excluded. Attention focused on the people and disregarded the house in which they lived. The matrimonial home facilitated the development of the new family based on affect, individual feeling and concern and yet in the legal concept of this human centred family, property apparently had no place.

The benefits of this privacy have been amply documented. Stone highlighted the significance of privatisation of the relationship and of physical privacy and many historical accounts record the gradual amelioration of private family existence. Donzelot discussed the social benefits of getting husbands and children off the streets and into their homes. Above I have considered some of the apparent advantages of home ownership in that the family was granted some form of escape from the public, commercial world and an element of self determination and self regulation. The privacy symbolised and in fact provided by the home was in keeping with the professed aims of the modern family of private affective relationships and freedom from economic pressure and external control. The extent to which this privacy from regulation remained intact has already been questioned above but it has been suggested that these methods of control concentrated on the individuals

themselves rather than on the property. In addition they were methods of control which the private home allowed to come into operation.

Further questioning of the privacy, ie. non-regulation, accorded to the family in the form of the family home can be based on the more fundamental problem of abuse of the privacy.

The most obvious and dramatic display of the alter ego of privacy is domestic violence. Such behaviour completely contradicts the image of the home as the centre of safety, affection and protection of the modern family. It may be argued that such behaviour results from over intensity of family relations; from an inherent male characteristic; from an extension of the underlying belief in the husband's right to control. Whatever the explanations it is a form of behaviour closely linked to family property and affected by the characterisation of family and home as private. With the increasing emphasis on the private nature of the family, the concentration of all that is good within and all that is bad outside, attention was diverted from abuse of the privacy which might result in violence within the home. Public reluctance to intervene in domestic disputes and the apparent willingness of others to turn a blind eye, reflect the attitude that the home and what happens within it are private.

The potential for legal intervention was limited. For the spouse threatened by domestic abuse, the civil remedy of interdict was available. A wife might seek an interdict against her husband molesting her but such a remedy was only available during court hours and it was extremely difficult to enforce. A court order was, in most cases, unlikely to withstand the husband's continued violence. For a wife still living with her husband, the process of seeking interdict might also be seen as an irreversible move, further damaging their private relationship. To seek police protection against domestic violence was likely to be more immediately effective in restraining the aggressor. Pursuing a criminal prosecution against a violent husband, however, was often seen as too drastic a step for a woman to take against her husband. In addition, the corroboration necessary to secure a conviction is difficult to procure in relation to a private dispute.

The available legal remedies against domestic abuse were therefore extremely inadequate. Not only were they ineffective against abuse, but they failed to tackle the underlying problem that, for a wife who did not have a legal right to the home, her alternative was often to tolerate the abuse or to face homelessness. It is increasingly common for husband and wife to take title to a home in joint names but for those where the home was owned in only one name or where the home was rented by only one spouse, the separate property system recognised the other spouse as having no right to the property. The separate

property system thought it better to deal with property disputes between spouses,

"upon the mere right of property ... and not to mix it up with ... the question of the inter-conjugal relations."⁴³

Scots law, therefore,

"equate[d] a wife who has no property title to a precarious occupier and so denies to such a wife the ability to regard the family home as a place in which she will be able to live and bring up a family secure from the possibility of sudden dispossession by her husband."⁴⁴

For the spouse who was neither owner nor tenant of the family home, the separate property system denied the existence of any legal right to the home. The Matrimonial Homes (Family Protection)(Scotland) Act 1981 strengthened the right of the non-entitled spouse to occupy the matrimonial home and used this as a base for relieving the effect of domestic abuse. In seeking to alleviate the position of victims of domestic violence, the Act was primarily directed not towards the behaviour of the aggressor but towards the practical solution of providing safe accommodation. It provided for regulation, not of the entitled spouse's basic right of ownership, but of the use of the property. In so doing it recognised the centrality of the private home to the family and the damage which violation of this domain could cause to the image of the family as private.

The Matrimonial Homes Act operates by affording to the non-entitled spouse occupancy rights in the matrimonial home.⁴⁵ The Act does not go so far as to give co-ownership of the property. It gives only a right of occupancy to the non-entitled spouse. The right of occupancy is an automatic incident of marriage although exercise of it, in the face of resistance by the proprietor spouse, requires leave of the court. The legislation, therefore, departs from the separate property system in that it recognises the interest of a spouse in property to which he or she has no legal right but which is closely linked to the marriage relationship. The granting of occupancy rights to a non-entitled spouse is recognition that, in terms of property, husband and wife are not the strangers which a separate property system deems them to be.

Having established the right of a non-entitled spouse to occupy the matrimonial home, further intervention in the rights of the entitled spouse were necessary to protect against domestic abuse. The Act therefore introduced exclusion orders empowering the court, on the application of the victim spouse, to exclude the aggressor from the matrimonial home.⁴⁶ The court will only grant an exclusion order where it is considered necessary for the protection of the applicant spouse or any child of the family from conduct or threatened conduct of the other spouse which is or would be injurious to physical or mental health. The court must also consider whether, in all the circumstances, the making of an exclusion order would be unjustified or

unreasonable.

The separate property system is being very slightly eroded, although ownership of the matrimonial home is not itself disturbed. The granting of occupancy rights and the availability of exclusion orders are signs of legal intervention in matrimonial property that are contradictory to the separate property system; a system which does not take account of the private marriage relationship in applying rules of property. They do not depart from the basic principle that marriage does not affect ownership, but instead they allow for regulation of the use which is made of a matrimonial home that is the property of husband or wife.

To some extent the right of occupancy is a private right. It lasts only for so long as the marriage lasts. It is a right which exists in recognition of her (or his) private role. The non-entitled spouse is not given a right of ownership to be used or disposed of at will. The non-entitled spouse is given an automatic right of occupancy, but it can be no greater than the right of the legally entitled spouse to occupy. It is effective against outsiders - third parties involved in the purchase of the property.

Law, however, continues to deny property as being a normal legitimate concern of marriage and family relations. The operation of the Act demonstrates a concentration on

individual behaviour, with the breakdown being seen as the result of individual flaws rather than of a potentially flawed system. It makes no provision for equal rights in the matrimonial home but has ironically been forced to intervene because of the misuse of this central piece of property. Both the problem of domestic violence and the solution which the Act provides, emphasise how vital the home is to the family. Yet in regulating occupancy by means of the Matrimonial Homes legislation the problem is confined within the private sphere. The family, minus one member, is reconfined within its private existence without much questioning of the fundamental problems.

It seems that the impetus to legislate on this problem was not simply the horrific and harmful existence to which many women were subjected but also what would happen when such women finally decided they could suffer no more and left their husband and home. The aspect of domestic violence on which the law chose to concentrate was the scene of the violence, the private circumstances in which such behaviour was able to take place. In the privacy of the successful relationship legal technicalities of ownership may be of little obvious import but when the relationship is threatened by the aggressive behaviour of one party and the behaviour threatens to cast the victims into the public sphere in search of shelter the question of home ownership and the provision of accommodation becomes of greater significance. By legal regulation of the occupation of the matrimonial home, a problem which could have become a much

more widespread and public issue, can be contained to some extent in private. Privacy continues to be held out as the norm and the ideal and failure in this sphere tends to be privatised and personalised.

NOTES

- 1 See chapter 6.
- 2 J.B.Elshtain, Public Man, Private Woman, p.104.
- 3 R.Unger, Knowledge and Politics, p.59.
- 4 N.Rose, "Beyond the Public/Private Division: Law, Power and the Family," (1987) 14 Journal of Law and Society 61, at p.65.
- 5 C.Pateman, "Feminist Critiques of the Public/Private Dichotomy," in S.I.Benn and G.F.Gaus (eds.), Public and Private in Social Life, p.281.
- 6 K.Green, "The Englishwoman's Castle - Inheritance and Private Property Today," 1988 M.L.R. 187.
- 7 K.O'Donovan, Sexual Divisions in Law, p.12: "The couple is ... a black box, into which the law does not purport to peer."
- 8 Recent legislation discussed later in this chapter provides one obvious example of the legal regulation of marriage.
- 9 More detailed consideration of these anachronisms is located in the discussions of legal reform and family history in chapters 2 and 3.
- 10 J.Lewis, Labour and Love, p.103.
- 11 K.O'Donovan, op.cit., p.8.
- 12 See discussion of Property as a Reward for Labour in chapter 4.
- 13 By means of the system of tocher and donatio.
- 14 This was presented by Stone in the companionate marriage and the modern affective family.
- 15 As evidenced, for example, by the operation of the husband's right of administration.
- 16 Income, as moveable property, passed to the husband by virtue of the jus mariti.
- 17 O.Kahn-Freund, "Recent Legislation on Matrimonial Property," 1970 33 M.L.R. 601, at p.605.
- 18 See changing rules of succession and discussion of property as an incentive to labour in chapter 4.
- 19 ss.1 and 6.
- 20 K.O'Donovan, op.cit., p.134.

- 21 As defined in the Introduction, the scope of my study is private law.
- 22 There is further discussion of conflict between individual and community within marriage in chapter 8.
- 23 K.O'Donovan, *op.cit.*, p.37.
- 24 It is not "a desirable custom, that the wife should contribute by her labour to the income of the family." J.S.Mill, The Subjection of Women, 1869, in A.Rossi (ed.), Essays on Sex Equality, p.173.
- 25 C.Pateman, The Disorder of Women, p.120.
- 26 L.J.Weitzman, "The Divorce Law Revolution and the Illusion of Equality: a View from the United States," in Essays in Family Law 1985, p.84.
- 27 See chapter 4.
- 28 K.O'Donovan, *op.cit.*, p.56.
- 29 eg., Balfour v. Balfour [1919] 2 K.B.571. There is evidence of a stricter approach towards the need to show intention to create legal relations with regard to "domestic" contracts. See discussion of Contract/Recompense in chapter 8.
A positive approach towards private agreements between spouses can be seen in relation to agreements concerning financial provision on divorce. The Family Law (Scotland) Act 1985 recognises that the parties might enter into an agreement relating to aliment (s.7) or financial provision on divorce (s.16).
- 30 *ibid.*, p.109.
- 31 It might be argued that what the Scottish Law Commission suggested was "a kind of deferred community of acquests": E.M.Clive, "Family Law Reform in Scotland - Past, Present and Future," 1989 J.R. 133, at p.144.
- 32 The court would first have to decide whether it was appropriate to make an order for financial provision - s.8.
- 33 The Act does make limited provision for modification of separation of property during marriage. Section 2(6) of the Family Law (Scotland) Act 1985 makes it competent for a spouse to raise an action for aliment even though the couple continue to cohabit. Previously law would not intervene in domestic maintenance.
- 34 Scot. Law Com., Consultative Memorandum 57, Matrimonial Property, 1983, p.55.
- 35 S. de Beauvoir, The Second Sex, p.467.
- 36 W.T.Murphy and H.Clark, The Family Home, p.2.

- 37 See discussion of growth of home ownership in chapter 4.
- 38 L.Stone, The Family, Sex and Marriage, p.253.
- 39 ibid., p.395.
- 40 Discussed by Stone at p.253.
- 41 R.Dobash and R.Dobash, Violence Against Wives: A Case Against the Patriarchy, p.7.
- 42 J.Donzelot, The Policing of Families.
- 43 Maclure v. Maclure, 1911 S.C.200, at p.205.
- 44 Scot. Law Com., Report 60, Occupancy Rights in the Matrimonial Home and Domestic Violence, July 1980, p.5.
- 45 s.1.
- 46 s.4.

CHAPTER 8: INDIVIDUALISM

Running throughout the histories of law, marriage and property, as discussed in chapters 2,3 and 4 there is an apparent move from community to individual. Values based on an idea of community seem to have given way to a value system linked to the individual. This trend is demonstrated in various ways in relation to the separate elements of marriage, property and law. Individual or community may have different meanings and different implications in relation to each element, but there are signs of a common shift from community in favour of individual.

The terms community and individual have different applications in discussion of marriage, property and law. I do not intend to set out precise definitions of them at the beginning because I want them to be sufficiently flexible to include a variety of developments and trends. In general I will be using individualism in the two ways described by Stone: first, meaning a growing interest in individual personality and a growing introspection, and secondly, individualism in the liberal sense, meaning personal autonomy and including the principle of freedom of contract.¹ I am using community in a vague sense, to convey the opposite of individual: based on an idea of some sort of distinct unit or combination which is more than simply the aggregate of individuals. A contrast between community and individualism may also imply a split between altruism and selfishness. In this way it has many similarities to

the dichotomy between private and public as discussed in the previous chapter.

An emerging image of marriage, property and legal regulation is that they are characterised by individualism. In this chapter I intend to consider this apparent shift from community to individual. I want to consider first, how a move towards individualism has been evident in the historical discussions of law, marriage and property. Having traced this trend from community to individual, I propose to question the existence of this distinction and to consider its effect on relations between marriage, property and law. To what extent are relations in marriage and relations between marriage, property and law now characterised by the individual rather than as previously by notions of community? A move from community to individual and a tendency to set up these two models as an opposing pair is prevalent in much discussion of developments in marriage, ownership and legal reform. The nature of developments in each of these elements and of relations between them is, I would suggest, much more ambivalent than such a straightforward method of presentation suggests.

BREAK UP OF SPOUSAL UNITY

There is clear evidence of a shift from community to individual and of a distinct split between them in the legal reform of the rules of Scots law governing the

property of husband and wife. Marriage under the common law could be argued to favour the unit of the married couple rather than the individual spouses. In legal terms the image of marriage was one of merger or even of submergence of two into one. Blackstone said that,

"by marriage the husband and wife are one person in law ... the very being or legal existence of the woman is suspended during marriage or at least is incorporated into that of her husband."²

Fraser applied this doctrine of spousal unity to Scotland, explaining that,

"marriage operates in regard to the wife, so as to sink her person in the eye of the law. The husband and wife are one."³

Although this doctrine was questioned and criticised,⁴ its influence was evident in the legal regulation of the property of husband and wife,⁵ where,

"the theory of the law is that the property of the spouses constitutes a common stock."⁶

In Scotland on marriage the moveable property of the wife, with some very minor exceptions, (for example, paraphernalia) passed into the ownership of the husband by virtue of the jus mariti. The wife's heritable property, while remaining under her nominal ownership, was fully controlled by the husband, by virtue of his right of administration. So on marriage, the wife's property passed

into the control and to some extent ownership of the husband. Her assets became mixed with those of her husband. Under common law the image is familiar of the wife, and her property, merging with or into the legal personality of her husband.

The common law regulation of marriage, particularly as evidenced by the control of property, shows marriage as a relationship creating a community; a community which overshadowed the previously separate individuals. It has been argued that the property rules of the common law did not produce a true community property system.⁷ Certainly it was not a system which granted equal rights to each spouse. It was a system by which the rights of the community were closely identified with the husband.

"There is a communion of goods betwixt the married persons ... but ... the administration during the marriage of the whole is alone in the husband."⁸

But there was nonetheless a combination of property and I am using the term "community" to mean some form of combination, however unequal.

Under this system there were legal rules - jus mariti and jus administrationis - which imposed a scheme of community on the property of husband and wife. The wife's individual legal persona was largely obliterated. The relationship of marriage was based on the doctrine of unity and this was reflected in the consolidation of their property. In both

contexts the wife merged into the husband and control remained with him. Explanations of the submergence of the wife in her husband are various based on, for example, religion, natural supremacy of the male or simply good and efficient management of the marital assets. As Fraser wrote

"Nature inculcates the utmost possible identity of interests and community of will between married persons; the husband being 'the head of the wife'; and this natural subordination upon the part of the wife has led to the positive law that in all civil matters having reference to their united means the husband should represent both."⁹

Stair at 1.4.9 traces the lordship of man over his wife to Genesis iii.16 and this Christian justification is echoed in Fraser's writing where he describes the designation of the husband as master in all matters of business as being evident in all Christian societies, contrasting them with savage societies where the woman is the breadwinner while the husband stays at home.¹⁰

Thus it can be seen that for whatever reason marriage was clearly regarded as bringing about the consolidation of two persons into one - that of the husband. Although during the currency of the relationship the communal nature of the goods might be rather overshadowed by the powerlessness of the woman and the merging of her assets into those of her husband the law did provide to some extent for the combining of the assets of both and for the distribution of the goods on the dissolution of the relationship to both husband and wife.

This legally enforced community was gradually dismantled by the reforms of the late 19th and early 20th centuries. There was a recognition of husband and wife as individuals. The wife's separate status emerged first where she had been deserted by her husband or had obtained a judicial separation.¹¹ Later, her separate status as an income earner was permitted¹² and finally her full individual status as a property owner was recognised. In particular the Married Women's Property (Scotland) Acts of 1881 and 1920 abolished respectively the jus mariti and the right of administration. Thus Scotland was left with complete separation of property in marriage. Marriage in itself was to have no effect on the property of individual spouses.

It can be seen therefore in the reform of the laws relating to the property of husband and wife that there was a gradual but extreme swing to a system based on individualism. The abolition of the jus mariti and the right of administration left a system which recognised marriage as having no effect on the property of spouses or on their status as property owners. The legal rules related only to individuals and took no notice of any marriage relationship. There was no recognition of a common fund of matrimonial property with the law dealing only with the separate assets of husband and wife. The law now treated spouses equally as individuals and disregarded their sex and their marital status. The basis of the law was individual legal rights with no concept of joint enterprise

or existence. The question of the continued unity of husband and wife within marriage was irrelevant to their individual rights as legal persons and property owners.

RISE OF AFFECTIVE INDIVIDUALISM

There were signs of a similar change of philosophy in the relationship of marriage itself. A central theme within Stone's history of marriage is that of a move from a type of marriage which was influenced by and open to community interests to one which concentrated on the individuals within the relationship. This swing from community to individual takes various forms in Stone's account. Community can be used to describe the extended family or the neighbourhood. Community can also be used to emphasise the importance of the married couple as a unit - the idea of spousal unity. He describes the decline of community involvement in marriage, meaning the involvement of either the community of an extended family or kin network or the community of neighbourhood. He also describes the increasing importance of the individual spouses rather than the community of the married couple. With the decline of community in these two forms, he charts the rise of the individual spouses and the importance of their individual happiness and relationships.

Stone begins with the open lineage family which formed only part of an extensive community of family and kin connections. It was,

"no more than a loose core at the centre of a dense network of lineage and kin relationships."¹³

The nuclear unit was open to the interference and control of this community as a result of its common interests in the unit. The open lineage family was controlled by the need for safe preservation and passage of property and thus it was open to the interference of the community whose status and well being would depend on prudent marriage. Marriages were often arranged by the extended community of the spouses' kin.

"Since the kin formed a community, marriage meant not so much intimate association with an individual as entry into a new world of the spouse's relatives, uncles, nephews and distant cousins."¹⁴

Among the lower classes this element of community involvement in marriage and family life was more likely to be provided by neighbours. For the property owning classes, the economics of marriage were important to the kin groups of the spouses. For the poor, the economic structure of marriage and the family unit was more likely to be the concern of the community of neighbours. The village community would often control decisions about the agricultural functioning of the village and this would influence the internal structure of the nuclear unit. In addition,

"domestic life in the village was unable to develop so long as it was overshadowed by the luxuriant growth of neighbourly activity and scrutiny."¹⁵

The village community played an important role in the control of individual behaviour and private morality through an extensive network of gossip and the threat of exposure of "violations of community norms."¹⁶

Michael Anderson points to one example of community censorship and control in his description of the powerful Kirk Session which was,

"fed by a continual supply of gossip from the villagers [and which] could summon the immoral or undutiful before it and apply a wide range of possible penalties."¹⁷

There was, therefore, emphasis on community, meaning the kinship or village system of which the nuclear unit formed only a small part. Within this system the community of the couple was also emphasised rather than the individual spouses. It was the unit of the married couple which was important. What mattered was continuation of the family line. The open lineage family was interested in the couple as a link in kinship lines. As Stone said,

"the purpose in life was to assure the continuity of the family ... not to maximise the well being of the individual."¹⁸

Stone said that in the 16th century and earlier the standard world view was that

"all individuals in society are bound together in the Great Chain of Being, and all are interchangeable with each

other. One wife could ... substitute for another like soldiers in an army."¹⁹

In this way the family line could be preserved with little regard for the individuals.

The decline of this type of marriage with its emphasis on the unity of the couple and on the influence of kinship and neighbourhood structure was partly due to the decline of a particular form of property and ownership. With the breakdown of large estates,²⁰ changing economic and agricultural structure and new methods of property transfer, marriage and the family were no longer such vital elements of property acquisition and control. Marriage as a kinship link lost its significance.²¹

According to Stone, however, the main reason for the demise of this concept of marriage was the rise of affective individualism. The development of this new philosophy is central to the changes which Stone charts in marriage. Stone argued that affective individualism was the product of two influences - a greater general interest in the individual and a change of personality type.²² Individualism itself was the product of two potentially conflicting sources. There was first a growing interest in the individual. This was evident in increased personal introspection and in the recognition that all humans are unique. The second source of individualism was a desire for personal autonomy. In accordance with liberal philosophy

each individual should have an area of personal autonomy and should recognise the personal autonomy of others.

In Stone's history affective individualism was part of a general social and economic trend. It was part of Renaissance culture, romantic literature, greater personal and religious introspection and commercial and industrial enterprise. According to Stone, there emerged a new belief. Far from humans being merely links in a great chain, all humans are in fact unique.

The changing nature of assets and a changing structure of ownership meant that property was no longer such a restrictive force on marriage. Stone describes how these changes and the decline of a society based on kinship and community had freed individuals to make their choice of partner on personal grounds. As a result marriage was no longer controlled to such an extent by concerns of property and status. The way was apparently clear for some new influence to shape marriage and according to Stone the new influence was affective individualism. Increased interest in personality, in personal emotion, in personal autonomy and in personal pleasure were influential in the emergence of a changed image of marriage.

This new emphasis on individualism was most obvious in relation to the choice of spouse. Increasingly it would be the individual prospective spouses who would make their own choice of marriage partner. Selection would no longer be

made or greatly influenced by their parents or kin. It was not a question of property alliance or kinship connections and the choice would be based on judgement of individual personality rather than on property or status considerations. A spouse would be chosen on the basis of desire for individual happiness rather than a requirement to further the common good of the family. At the heart of this emphasis on individualism, Stone argued that there was a new philosophy. It was a philosophy which placed,

"the selfish pursuit of pleasure in this world at the centre of human psychological motivation."²³

This formed the basis for Stone's description of the emergence of a new form of marriage centred on affective individualism. The progress towards this form of marriage was not entirely straightforward. There was a temporary set back in the restricted patriarchal nuclear family. Although this family was relatively free from interference by the community of family or neighbours, it was subject to the authority of the father. It recognised the importance of individual choice of spouse, it recognised the unique quality of individual personality but it also recognised the chaos which the cohabitation of free and equal individuals might cause. It was feared that the result would be "the war of all against all" and therefore an attempt to maintain control was made "by the imposition of stern patriarchal power."²⁴ It thus gave personal autonomy to the father who might in return restrict the individual

freedom of the other members of the family. This family type signalled the closing off of the individual nuclear unit from the interference of community. It also gave limited recognition to individuals but it favoured the individual freedom and power of the father.

It was finally in the closed domesticated nuclear family that individualism triumphed. Within this family, individual qualities, individual happiness and individual freedom were supreme. The unit itself was free from community interference and involvement. The purpose of the marriage was individual development and its focus was the relations between individual family members.

To some extent a common image emerges from both Stone's historical account and from the changes in property rules. In both there are signs of a shift from community to individualism as a guiding force in the nature and form of marriage. Stone suggests a move from the supremacy of the family as a unit to the importance of the individuals. He also describes the decreasing involvement of a wider community, of family or neighbours, in marriage. This trend was facilitated by economic and political changes in society but it was directly the result of the rise of what Stone terms affective individualism. This emphasised the freedom of choice of individuals and it emphasised the individual personalities and relations within marriage. The legal act of marriage was no longer of such great importance simply as a link in a property or kinship

structure. The legal rules governing the property of husband and wife show a similar trend. The changing legal rules demonstrate a shift from an imposed combination of assets to a system which had no effect on the property of individual spouses. The reforms produce a system which guarantees individual legal rights and makes no recognition of marital community.

INDIVIDUAL ASSETS

So far I have dealt only with individualism in human terms. Individualism, however, is not a term applicable only to personal relationships. It can also be used in relation to property. A shift can also be detected in terms of property from community to individual.

Under the common law system of property regulation and in what Stone described as the property centred marriage the most important type of property was land and the income derived from it. This type of property was to a large extent determined before birth and prior to marriage. It was based on one's family and not on one's individual worth. Within a feudal system and through the operation of family settlements, entails and rules of succession, rights to such land were rarely unrestricted individual rights. With changing rules of landownership, industrialisation and a new economic structure, income and the power to acquire property were less likely to be a consequence of birth or marriage. Instead income and property would more often

result from individual labour. Property was a reward for the individual rather than a consequence of membership of a community - a family or kinship group. The bulk of matrimonial property would no longer be granted to the couple on account of their marriage. It would be acquired for the quite separate reason of individual labour. In these ways there was also a shift in terms of property from community to individual.

TENSION

There emerges, from studies of each of the elements of legal reform, marriage and property, an apparent shift from community to individual. In each of the elements, the specific form of this shift is different but there is nonetheless an apparently common direction. I would suggest, however, that it is misleading to fit developments in marriage, property and law into the confines of a straightforward move from community to individual. Such a simplistic structure hides the continuing involvement of both of these concepts. An emphasis on individualism does not necessarily mean the disappearance of community.

"There is an eternal tension in matrimonial law, in social attitudes and in every marriage between the community of life that marriage involves and the separate autonomous existence of the individuals who are associated in this community of life."²⁵

This quotation describes a tension between individual and community which can be detected in the historical

discussions of marriage, legal reform and matrimonial property and in the relations between these three elements. From the historical discussions of marriage and law, individualism has emerged as a dominant characteristic of the modern image of marriage and its relation with law and property. The characteristic of individualism has emerged apparently to overshadow community. At the centre of Stone's history is a shift from a system of marriage that showed little concern for the individual spouses and that protected the interests of the community to one where individual choice and satisfaction was paramount. A similar shift was presented in terms of legal reform, from a system of combined assets of husband and wife to a system that treated them as entirely separate individuals. In terms of property, increasing emphasis on the rights of the individual can also be seen with, inter alia, the demise of entail and the growth of waged labour.

Closer analysis shows, however, that the rise of individualism did not consistently signal the death of community. I would argue that, in marriage, individualism and community are not mutually exclusive. In terms of property, although there is a closer link between individual and asset, there is also a closer link between the domestic nuclear family and its property. It is only in the legal reform that individualism clearly replaced community. Thus community has not been consistently replaced by individualism. Instead both co-exist and thus give rise to a tension such as described by Glendon.

Individualism in terms of legal rights is fixed and inflexible. It does not take account of failings within the relationship of marriage to achieve the extremes of community or individualism nor of the falsity of this split. The legal rules, which followed the removal of jus mariti and the husband's right of administration, are clear. They do not allow for the mixture of community and individual which may exist within marriage.²⁶

Stone seemed to suggest that marriage was now to be viewed as a relationship between two individuals rather than as a unit. This was an image which gained support in the new approach of law to the property of husband and wife. But the individualism which Stone described had only a limited role to play in the marriage relationship. I want to look at two models of marriage which demonstrate how the community of marriage might still overshadow the emphasis on the individuals. They show that although individualism was emphasised at the formation of marriage, it is misleading to assume that it signals the death of community.

THE COMPANIONATE MARRIAGE

Stone describes the rise of affective individualism, and its specific effect on marriage, as increasing the importance of the individual spouses. In particular, he emphasises the importance of the individuals at the point of entry into the marriage. Parents allowed their children

much greater freedom to arrange their own marriages and the process of selection was less influenced by kin and property concerns. He then goes on to consider how the relationship between these two individuals developed. Spouses previously had been bound together by property concerns. What was to tie the individuals together within the new marriage which apparently had no interest in property? One answer to this question can be found in Stone's description of the companionate marriage.

The companionate marriage, as the name suggests, was a marriage based on companionship, affection and personal relationships. Increasingly the choice of partner would be made on the basis of emotional satisfaction rather than ambition for status or wealth. It was hoped that from this beginning affection would develop. Stone describes the new companionate marriage which was centred around the cosy domesticity of the matrimonial home. The wife was increasingly educated so that she could be a better helpmate to her husband and a teacher to her children; there was greater privacy and isolation of the conjugal couple and their children. There was a recognition of sexuality and companionship as legitimate aspects of the marriage relationship.

The emphasis at the formation of this new type of marriage was on individual choice and individual happiness. But the happiness and satisfaction of these individuals was to be pursued within what Stone described as the companionate

marriage. It was a relationship in which the individual personalities were important but they were important largely from the point of view of compatibility. Allowing individual choice of partner was a way of ensuring - hopefully - that a strong personal bond would develop.

Stone said that,

"marriage ceased to be mainly an artificial but necessary constraint placed upon man's otherwise unbridled lust, and became instead a prime source of personal pleasure, both emotional and sexual ... This new pragmatism planned to make the individual's desire for happiness contribute to the common good."²⁷

In these words Stone demonstrates how the interests of individualism and community were to be combined in the new marriage form. The community of the companionate marriage was not community enforced by legal rules of property or imposed by the religious inspired doctrine of unity. It was a community of life, emotion and companionship. The spouses were no longer tied together by the legal rules governing their property. They were encouraged to bind themselves together in terms of emotion, intellect and personal development.

This new community stemmed from the promotion of a form of individualism. The companionate marriage was based on a new type of philosophy; one that placed personal satisfaction and the pursuit of happiness as its goal. While the foundation of the companionate marriage was individual

freedom, individual choice and individual personality, its goal was the creation of a community.

MARRIAGE AS A CONTRACT

Legal writers have often spoken of marriage as a contract. With the demise of the marriage form based on submergence of the wife; with the emergence of the wife as a legal person, and with the changing position of property in marriage it became popular to speak of marriage as a contract. It was regarded as an agreement entered into freely by two individuals. This was an extension of a general adoption of liberal philosophy and terminology. The suggestion was that there was a shift from status - something which is imposed or attributed - towards contract. This method of viewing marriage again emphasised the importance and freedom of individuals. It highlighted individual autonomy and freedom of will.²⁸

As with the companionate marriage, I would suggest that the contract model gives unmerited emphasis to the individual within the relationship. The use of a contractual analogy for the relationship of marriage falsely highlights the individual. It does so first on the basis of purely legal argument. Marriage is at best only partly contractual. The second way in which the use of contract misleads is a result of the particular type of contract to which marriage has been compared.

Many of the Scottish legal writers between the 17th and 19th centuries considered the idea of marriage as a contract. Erskine approved the notion, writing that "marriage is truly a contract."²⁹ Others were more critical in their consideration of marriage as a contract. Fraser said that many juridical writers had defined marriage as a contract but that this definition had been "the fruitful source of grave error."³⁰

This application of the legal definition of contract to marriage contributed to an increased emphasis on the individual. Stone's emphasis on the individual - the individual choice of spouse - was overshadowed by the subsequent promotion of the companionate marriage. In a similar way, in legal terms, the contractual analogy highlighted the agreement of two individuals. It portrayed marriage as a privately negotiated agreement, as an exchange of obligations between individuals. The contract analogy however ended at the point where consent was given. It is suggested that the emphasis on marriage as a contract may have been intended to convey the rule that marriage is constituted by agreement alone and without the need for consummation.³¹

What followed the giving of consent varied according to different writers. Stair argued that entry to marriage was based on consent but thereafter the individuals could not "frame or compose" the form of the relationship "at their own will." According to Stair, marriage was

"not a human, but a divine contract ... Though marriage seem to be a voluntary contract by engagement ... yet that marriage itself, and the obligations thence arising, are jure divino."32

For Fraser, entry to marriage was governed by the law of contract, based as it was on individual consent. Immediately consent had been given, however, the relationship became governed by the law of husband and wife which "tramples down all private stipulations."³³ Contract gave way to legally defined status. Fraser also had sympathy with Hegel's concept of marriage. Marriage was a contract in that it required the consent of two persons, but it was very much more than that. Marriage was an agreement to transcend the idea of contract.³⁴

For all of these writers marriage was only to a very limited extent contractual. Marriage was based on consent and in that sense could be defined as contractual but, thereafter, the power was taken out of the hands of the individuals. It was not for them to stipulate the form, the duration and the obligations of their contract. These were imposed upon them by municipal law, the law of husband and wife or indeed by divine law. The relationship was at best a combination of contract and status. It granted supremacy to the individual at the point of entry, but having given their consent the individuals were transformed. They gave their consent as individuals to enter the institution of marriage but thereafter their individual freedom was subsumed to the community of marriage.

From a purely legal approach the use of contract to define the relationship of marriage was inaccurate and misleading. Marriage was only in a very limited legal sense a contract. Marriage was formed by means of a contract between two individuals but thereafter they became subject to imposed status.

The contract analogy also gave a misleading image of individual freedom in terms of the particular type of contract. Many of the legal writers saw marriage as a specific type of contract. Marriage was not a contract of sale. Nor from the point of view of the lawyers was it a contract for mutual sexual use. It was a contract of partnership. Erskine described marriage as a contract of partnership. Stair considered marriage as a contract of partnership, particularly in terms of the regulation of property. According to Stair the rights which a husband had over the combined property were not really for the purpose of ownership. The husband had rights over the combined fund because it was the partnership fund of husband and wife. It was in the interests of better administration and management of the fund to give sole powers of administration and control to one partner.³⁵

This particular legal model of marriage as a partnership is significant to consideration of the tension between individual and community. A contract of partnership, under Scots law, involves the agreement of two to form a new personality - the partnership, the marriage unit.

This notion of marriage as a partnership was not something which was imposed by legal rules. It developed as a result of various diverse influences. The separation of home from work; the introduction of a family wage; the rise in importance of the matrimonial home; the cult of domesticity; the centrality of children to the family, and the increased medical and social opinion highlighting the need for close bonding between mother and child all contributed to the creation of promoted roles for both husband and wife. Both were now seen as essential to a successful marriage and family. It was not just their simple coupling that was important but their continued interaction. They were to form a partnership of the most successful kind, with each partner bringing different but equally important skills.

To some extent the promotion of new and separate roles for husband and wife and, in particular, the creation of a sphere of importance for the wife equalised their different roles and made it possible to view marriage as a partnership. It was an enterprise to which each could bring different but complementary skills. The consequence of entering into partnership, however, is to create a new entity. In this way their individual freedom to choose to enter into a contract and their individual importance as partners was overshadowed by the creation and form of the partnership.

IDEALS AND REALITY

"Individual liberty ... and the community of life of spouses are ideals, but the law governing the economic relations of spouses operates in the realm of economic ... reality."³⁶

Stone's emphasis on individualism as a dominant factor in the companionate marriage and the emphasis in legal discussion on the contractual nature of marriage give precedence to the importance of the individuals at the point of entry to the marriage. They do not deal adequately with the close bonding; the combined unit; the community that are also present in each of these models of marriage. They contribute to an image of marriage with which the subsequent relationship may fail to fit.

Simone de Beauvoir in The Second Sex wrote that,

"the couple should not be regarded as a unit; rather each individual should be integrated as such in society at large ... then attachments could be formed in pure generosity with another individual equally adapted to the group."³⁷

Modern concepts of marriage have hinted at this sort of relationship. Stone has suggested that the modern marriage is based on individualism. The use of contract, borrowed from society at large, has suggested that marriage is a freely made relationship between two individuals. Individualism, however, is only present on entry to the relationship and in defining the roles of the spouses.

Modern concepts of marriage continue to encourage or to expect the subsequent creation of a community.

Legal rules governing the property of husband and wife, however, have completely espoused this ideal of individualism. They assume a relationship between two equally adapted individuals. They ignore the community of life in which the individual spouses participate. Thus there has been created a split: a tension between community and individualism. There is a split between, on the one hand, a marriage which inconsistently promotes individualism and community and, on the other hand, laws of property which consistently treat the spouses as individuals. The split may have serious repercussions in property terms because assets, while likely to have been acquired by one or other spouse individually, are closely linked to the existence of the community of marriage.

Lee Holcombe sums up this split.

"Husbands and wives have assets as members of a family rather than as individuals ... although these assets are financed by the earnings of individual members of the family. But the law assigns ownership of property to the individual whose assets purchased it, not to the husband and wife jointly or to the whole family."³⁸

LEGAL COMPROMISE

Law has at times recognised this tension in marriage between individual and community in relation to property. It has been prepared to diverge in some way from the basic property system. Both under the community of the common law system and under the individualism of the present system of separate property the law has occasionally recognised that marriage involves elements of both or that a particular marriage relationship may fail to fulfil the ideal. These measures have tended to take the form of compromise and ad hoc modifications, designed to alleviate particularly harsh aspects of the tension between community and individual in terms of marriage and property. They have not involved any widescale consideration of the fundamental tension which continues to exist between a relationship which is based on community and a system of property which finds it difficult to envisage any kind of ownership other than one based on individuals. They do not fully expose the inconsistencies that persist in marriage and its relationship with property.

I intend to consider three legal methods that have been developed to reconcile conflicting interests of individuals within marriage and conflicting interests of the individual good and the common good. Marriage contracts were used in the 19th century as a model for affording protection to individuals within marriage and family groups. More recently, occupancy rights under the Matrimonial Homes

(Family Protection) (Scotland) Act 1981 have recognised the potential danger of the pathological individual within the family community and the financial and property provisions of the Family Law (Scotland) Act 1985 have signalled an acceptance of the inadequacy of equal individual rights within a practical economic community.

All of these measures have existed simultaneously with, but to some extent in contradiction of, the basic system of rules governing the property of husband and wife. Contracts provided individual protection in contrast to the basic community property system, whereas the Matrimonial Homes (Family Protection)(Scotland) Act 1981 and the Family Law (Scotland) Act 1985 introduce elements of community into a system of separation of property. All three measures show an attempt to cause minimal disturbance to the underlying system. They aim to alleviate the hardships arising from the community/individual tension without entering into fundamental questioning of it. They use legal devices which allow some co-existence of community and individual.

PROTECTIVE TRUSTS

Perhaps the most obvious instance of conflict between individual and community within marriage was to be found under the common law. In that marriage relationship the wife merged into her husband with limited legal recognition of her individual existence and no separate rights to control her property. She was part of a community which was

controlled by the husband. The promoted ideal was of a husband who administered the common fund in the interests of the partnership of husband and wife. Under the common law rules, the wife had very limited individual legal status and she was treated as incorporated into the unity of marriage: a relationship which was represented by her husband.

This was a legal system which did not allow for co-existence of two individuals within the relationship of marriage. Husband and wife combined to form one and this one was represented by the husband. The vulnerability of the wife's position within this ideal and the possibility of conflict between the husband's interest, the wife's interest and the interest of the community that they formed did not go unnoticed. Private variation of the common law was permitted through the use of marriage contracts and in these there could be detected signs of commercial concern for the individual.

Propertied families had long made use of ante-nuptial contracts to regulate the financial basis of marriage. In their earlier form these contracts would be used to set out the contributions to be made by both parties to the marriage, to regulate the administration of this fund of matrimonial property and to provide for its subsequent distribution.

"The marriage contract simply regulated the sums - tocher and donation propter nuptias - that were to be contributed

by the parties respectively, their interests in the amount and the manner in which it was to be invested."³⁹

Marriage could be regarded as a joint venture, with husband and wife usually contributing to its financial base. For the property owning classes, assets donated by both sides to the marriage would frequently be invested to provide an income for the couple. The marriage contract could be used to set out the contributions to be made, how they were to be invested and what returns each individual should receive.

In this early form, marriage contracts did not exclude the husband's jus mariti or jus administrationis. They could not be used to disturb the legally imposed combination of property of husband and wife.

"This right of the husband in the goods of the wife is so great, that hardly can it be avoided by the pactions of the parties."⁴⁰

They adhered to the common law system which granted control and lordship to the husband, while regulating the specific assets of the couple and ensuring that there would be adequate individual return for investment in the matrimonial fund. Marriage contracts of this kind were limited in their aim to the fixing of specific provisions in relation to donation and distribution. They were unable to alter the husband's power over the property of the

marriage, but they did offer certainty as to the share of each spouse in the property.

It was not until the decision in Walker v. Creditors of her Husband⁴¹ that renunciation of the jus mariti was permitted. Previously it had been argued that,

"such a renunciation or reservation, being a right conceived in favour of the wife, fell under the jus mariti and disappeared."⁴²

By 1745 it was agreed that the right of administration could also be renounced.⁴³ Once it had been accepted that the jus mariti and the right of administration could be excluded, the scope for marriage contracts widened considerably.⁴⁴ Thus marriage contracts could be used to avoid the automatic combination, on marriage, of the property of husband and wife. By means of a marriage contract, a separate estate could be maintained for the wife.

The details of each contract varied widely, reflecting their original purpose of allowing for specific variation of the general law. There emerged, however, a common pattern by which the husband would make financial provision for his wife following his death usually by means of an annuity or liferent and the wife might make similar provision for her husband. It was likely that provision would also be made for any children of the marriage. Clive describes a common form which such a contract might take.

It would often provide for a liferent or annuity for the wife on her husband's death. He explained that the wife would usually be given a fixed annuity and she might also be given a

"liferent of conquest which would give her an equitable share in any subsequent improvement in"

her husband's circumstances.⁴⁵

An effective and increasingly popular method of securing these obligations was by the setting up of a trust.

"With the growth of the trust concept ... it became more common for the husband to convey property to trustees to be held perhaps for himself in liferent, then for his widow in liferent and for the children in fee."⁴⁶

In this way the husband was guaranteeing future provision for the wife. Her financial security on her husband's death was achieved by placing a portion of the husband's property out of his reach and beyond the reach of his creditors.

Money given to the wife, perhaps by her father, might also be placed in the hands of trustees. This, in conjunction with an exclusion of the jus mariti, would provide for the wife a separate income while preventing her from misusing the capital. This device meant that,

"wealthy fathers who wanted to protect their daughters from being financially dominated by their husbands after

marriage could convey or bequeath property in trust to pay the income to their daughters for their separate use."⁴⁷

Such a scheme would protect the individual needs of the wife. The setting up of a trust to control the wife's property was an important way of guarding her against the business failures of her husband.⁴⁸ Where the jus mariti was excluded by private contract or later abolished by the Married Women's Property (Scotland) Act 1881, the wife's moveable property remained her separate estate.⁴⁹ She might nonetheless gift or loan some of this property to her husband or it might in some way become mixed with his estate. There was concern that such property could then be attached by the husband's creditors. In particular, if the husband became bankrupt, the trustee could claim the wife's moveable property which had become inmixed with that of the husband. Only if her property was kept separate from her husband's would it escape from her husband's creditors and one way of keeping her property quite separate was to place it in trust.

A wife's property could be placed in trust not only to protect her from her husband but also to protect her from herself. Having encouraged a woman in the altruism necessary for maintenance of the family community, there was fear lest she might foolishly indulge her husband or children at the expense of her capital. Murray said of the modern marriage contract that its purpose was,

"by means of the machinery of a trust, to place a certain amount of the property of the spouses beyond their own control ... to protect the wife's property against her husband and against herself."⁵⁰

The court in Menzies v. Murray⁵¹ held that the provisions of a marriage contract relating to the spouses and their children could not be renounced, even where all parties consented. Thus a wife, perhaps under pressure from her husband, could not reject the protection that had been negotiated for her. Further protection for the provisions of the contract could be secured by constituting them as alimentary in nature. Such alimentary provisions could not be alienated or attached by creditors.⁵² Under such provisions, the capital would remain within control of the trustees who would pay an annuity to the beneficiary solely for the purpose of his or her maintenance.

The use of marriage contracts and later of trusts, if not inspired by a desire for female equality, was at least a recognition of the danger inherent in a regime which assumed a common interest and which gave the husband full responsibility for it. It recognised that there were potentially conflicting interests within the supposed community and that the supremacy of one spouse might threaten and override the claims of the other family members. Marriage contracts and trusts were signs that the promoted image of community and common interest within marriage might not be achieved. The common law which combined property of husband and wife continued to mirror

the doctrine of spousal unity. In private, however, marriage settlements recognised the potential conflicts of interest within this community. They were an admission of the tension between the officially promoted unity of the relationship and the interests of the individuals.

The marriage contract was largely a device of protection. In its earlier form it was designed to protect both parties by ensuring that individual contributions to the matrimonial fund were clearly set out and that provision was made for subsequent sharing of the fund. With the later use of marriage contracts to exclude jus mariti and jus administrationis, there was protection for the wife by giving her a separate estate. By excluding the husband's rights over his wife's property, recognition was given to the wife's individual existence as a property owner. She was protected from the potential dangers of her property being placed in the hands of her husband. Protection of the individual spouses could also be seen in the use of trusts as a means of securing financial provision. By placing property in the hands of trustees, provision could be ensured for husband or wife. Property placed in trust was set aside from the couple's existence. In particular the wife's property could be set apart from her husband and protected from his creditors. It was thus safe from individual failings or misfortunes of the spouses.

The use of trusts was also an interesting recognition of the tension between individual and community or between

selfishness and altruism within marriage. The trust was seen as a means of protection not only from others but from oneself. Where a father set up a trust in favour of his daughter, the aim was often to protect the wife not only from her husband but also from herself. There was here an attempt to balance the altruism which would be expected of the wife within marriage with the selfishness necessary to maintain her wealth. Property placed in trust would provide an income for the wife, while maintaining the trust fund outwith her hands and thus preventing the wife from squandering it on her husband and children.

SECURE COMMUNITY

A more recent attempt to deal with the tension between community and individual can be seen in the Matrimonial Homes (Family Protection)(Scotland) Act 1981. This legislation was introduced to deal with two separate but often interlinking problems - the precarious position of a spouse who does not have legal title to occupy the matrimonial home and the problem of domestic violence. Both of the problems can be considered in terms of conflict between individuals within the relationship and in terms of conflict between the interests of individual and community.

The matrimonial or family home has already been discussed with regard to developments in the personal relationship of marriage and in relation to property. Stone describes the importance of the family home as offering private domestic

space within which family relationships can develop. The family home ideally would provide a purpose for the wife and a haven for the husband. In terms of property the family home also became increasingly important, with a rise in house building and owner occupation.

There appears to be a similar pattern, with the family home gaining in prominence both in terms of marriage and in terms of ownership, but closer analysis suggests that there is ground for conflict. The image of the companionate marriage, developing within the matrimonial home, is an image which is based on community. What is envisaged is the close co-existence of husband and wife (and their children) within the home. The growth in home ownership however is a development which is primarily individualistic. While occupation is envisaged on a communal basis, for many families ownership is an individual right.

Where a house is owned or rented in the name of the husband,⁵³

"the wife is in no better position than a mistress or a trespasser or squatter whom the husband can turn out of the home at will."⁵⁴

Traditionally in Scots law the position of the wife in relation to the family home has been precarious. In terms of the marriage relationship it has been promoted as her domain but in legal terms her right to occupation against the wishes of her husband has been limited. It has been

argued that, under the common law, a husband had power to evict his wife by reason of his right of administration.⁵⁵ This was later held to be the case even where the house was owned by the woman. With the decline of the husband's power over his wife and with the changing legal rules and the move towards separation of property, the right to evict came to be based simply on legal title to the house. In MacLure v. MacLure,⁵⁶ it was confirmed that a husband's right to evict his wife was a result of his rights as owner or tenant. It was entirely separate from their conjugal relationship. A wife could be evicted in the same way as a stranger. This was in keeping with the move towards a system of separate property which takes no account of the relationship between husband and wife. The application of the separate property principle to the matrimonial home gave virtually unrestricted power to the legally entitled spouse to evict his wife.

There was a stark contrast between, on one side, the ideology of community which characterises marriage and the modern nuclear family and, on the other, the strict individuality of property rights. The family home was regarded as vital to the proper existence of the domestic family but, in terms of ownership, Scots law took no notice of the relations between husband and wife. It was difficult to sustain a property system which paid no heed to the marriage relationship in particular when it allowed the eviction of a wife from the setting in which the

relationship encouraged her to exist. The existing law denied to a wife who had no legal title to the home,

"the ability to regard the family home as a place in which she will be able to live and bring up a family secure from the possibility of sudden dispossession by her husband."⁵⁷

The power of the husband to evict his wife at will pointed out the impoverished nature of community within marriage and within the home. The negative "conception of community as an idyllic haven of harmony"⁵⁸; "as the absence of conflict"⁵⁹ was exposed by the husband's power to control occupancy of the family home. By giving occupancy rights only to the legal owner, Scots law was supporting a community which depended for its existence on the goodwill of one individual. Co-residence in the family home was not based on mutual rights but was based on dependency and avoidance of conflict.

The Matrimonial Homes (Family Protection) (Scotland) Act 1981, therefore, aimed to provide some security for individual spouses to co-exist within the matrimonial home. In the Act there was a move to satisfy the view that,

"the spouses will regard the home as 'theirs'. The law should treat it as 'theirs'."⁶⁰

Certainly the ideology of marriage and the image of the modern companionate marriage raise the expectation that the home is "theirs." Strict separation of property

demonstrated that fulfillment of this expectation depended not on any legally recognised relation between the family, as a community, and the home but on the continuing indulgence of the legally entitled spouse. It was, therefore, recognised that there was a need to give legal expression to the wife's expectation of security in the family home.

The way in which the Matrimonial Homes Act chose to provide this security left largely untouched the separate property system. By section 1 of the Act a wife, by virtue of marriage, is given an occupancy right in the matrimonial home. Occupancy rights do not affect ownership of the home but they provide means whereby its use can be controlled. To give co-ownership of the matrimonial home, as an incident of marriage, would have been an extreme departure from the system of separate property. It would have heightened the emphasis on individuality within marriage. It would have introduced fixed shares and the notion of division into the couple's relations to their home. By using occupancy rights it might be argued that the law is strengthening the community nature of marriage. Occupancy rights arise automatically on marriage but in the absence of conflict within marriage they are likely to remain dormant. They provide legal recognition of the importance of communal life to the ideal of the companionate marriage and they give a secure legally enforceable basis to this ideal. Although occupancy rights are an automatic incident of marriage, the power to regulate them rests with the

court. Thus in cases of conflict between spouses, as to the home, the court is able to regulate occupancy of it.

A specific situation which requires regulation of occupancy rights in the matrimonial home is that of domestic violence. Alleviation of this problem was the second purpose of the Matrimonial Homes (Family Protection) (Scotland) Act. Giving the wife a legal right to occupy the home was seen as a prerequisite for dealing with the problem of domestic violence. Knowledge that her continued co-existence in the home depended on the permission of her husband might force a woman to endure domestic abuse. An absence of conflict, meaning acceptance by the wife of her husband's violence, was often perceived by the woman as the only way of maintaining the community's residence.

The problem of domestic violence is a threat to the safety of the matrimonial home and it threatens to disrupt the harmony of the family's existence. The choice often presented to a victim wife was to continue suffering in order to preserve the community of her family or to expose the individual pathology existing within it and as a result risk the family's disintegration and the possible homelessness of some of its members. Existing legal remedies were largely ineffective and therefore the Scottish Law Commission suggested a scheme of protection against domestic violence which was based in the matrimonial home and which would minimise damage to the family community.

The protection which the Act provides against domestic violence is based on regulation of occupation of the matrimonial home. While the legislation does not interfere with ownership of the home, the provisions relating to domestic violence represent a significant interference with personal enjoyment of property. Section 4 gives the court the power to exclude a spouse from the matrimonial home. The expectation was that this would usually mean exclusion of the spouse who has legal title to the house. The availability of an exclusion order makes it possible to divide the incidents that are normally part of ownership between two individuals. Where a legally entitled husband is excluded from the matrimonial home, he retains ownership of the property but use and enjoyment of it is reserved for his wife.

The court will only make an exclusion order where,

"it appears to the court that the making of the order is necessary for the protection of the applicant or of any child of the family from any conduct or any threatened or reasonably apprehended conduct of the non-applicant spouse which is or would be injurious to the physical or mental health of the applicant or child."⁶¹

There is in this provision evidence of a move away from the priority of individual property rights to the idea of an imposed scheme of regulation which promotes personal values. An individual claim over the house as a simple asset is subsumed to the continued use of it as a family home. Protection of the wife and children and their

continued co-existence within a family unit is seen as more important than fulfillment of legal expectations arising from individual rights. The Scottish Law Commission in its Memorandum said that,

"the sole situation in which exclusion is justified is where it is necessary for the protection of the remaining members of the family."⁶²

The provisions of the legislation dealing with domestic violence demonstrate a preference for the continued existence of the family community within the matrimonial home over the protection of an individual legal right. They give legal recognition to the promoted community nature of marriage by securing the rights of members of the community to occupy the matrimonial home. At the same time, they introduce a mechanism whereby there can be judicial control of occupancy of the matrimonial home. Through this regulation, the threat of individual deviance can be lessened and a reduced family - usually the wife and children - can continue to occupy the family home. The Matrimonial Homes (Family Protection) (Scotland) Act 1981 is strong evidence of the tension between individual and community within marriage. It tries to deal with the individual who threatens the secure and loving family community; a problem which, in legal terms, is exacerbated by a tension between individual legal rights of ownership and the community expectation of residence.

CONTRACT/RECOMPENSE

In their Consultative Memorandum on Matrimonial Property, which formed the background to the Family Law (Scotland) Act 1985, the Scottish Law Commission note that,

"in the modern search for a matrimonial property law which combines fair sharing with equal rights, and practicability with protection, traditional divisions are breaking down."⁶³

There are signs of a movement away from either community or separate systems to systems that combine elements of both. The compromise which the Scottish Law Commission finally chose was one which left largely unchanged the principle of separation of property during marriage but encouraged sharing of a fund of matrimonial assets on divorce.⁶⁴

In the provisions of the Family Law (Scotland) Act 1985 there is evidence of a movement away from an individualistic approach to the property of husband and wife. There are signs of a rejection of a strict liberalist approach to property and recognition of a continuing need for protection rather than individual autonomy. The values of the individualist market require some modification in the community of the family.

Liberalism championed the model of freedom of contract. This was a model which infiltrated marriage, with the contractual nature of the marriage relationship being

emphasised. Legal discussion of the categorisation of marriage as a contract pointed out the inadequacy of this legal relationship as a description of marriage. Marriage was contractual only to the extent that it required consent for its formation. The legal relationship of marriage depended on consent. Without consent there could be no marriage. But marriage only possessed this one aspect of contract. Having exchanged consent the parties were not free to negotiate their own terms. The basic obligations and incidents of marriage were not to be left to individual negotiation but were imposed by the law of husband and wife. Individuals chose to enter into the contract of marriage but the terms of the contract were imposed on them.⁶⁵

Following the Married Women's Property reform legislation, one aspect of marriage was, however, left entirely to the individual negotiation of spouses. With the abolition of the jus mariti and the husband's right of administration, the law of husband and wife provided no terms of the contract to deal with property. It was left to the parties to regulate their own financial affairs. Perhaps because of the ideological force of the split between property and affect, between love and money; perhaps because of trust in the obligations of the personal relationship, few couples make their own contractual provision.

Under Scots law, husband and wife can make contracts with each other. By section 3(1) of the Married Women's Property

(Scotland) Act 1920 a married woman is "capable of entering into contracts ... as if she were not married." There continues, however, to be a difference in the legal approach to such agreements. It is an essential of contract that there is an intention to create legal relations. That is what distinguishes a social arrangement from a legally enforceable contract. The general rule is that there is no need for express intention. The law will imply an intention to create legal relations. In domestic contracts, however, the opposite rule applies. The law assumes that agreements made within a domestic context are not meant to be legally enforceable. It is always possible for a husband and wife to expressly state in their agreement that they intend it to be a legally binding contract but in the absence of such express statement the court will assume the opposite.

Spouses are free to enter into contracts with each other in relation to rights in and ownership of property. They must show, however, an extraordinarily strong expression of intent. Otherwise the presumption will prevail that domestic agreements are not intended to be contractual.

There is a more abstract barrier to the creation of domestic contracts to be found in the presentation of a split between community and contract. A contrast is present between community, with the implication of altruism and contract, as a legal method inspired by selfishness.⁶⁶ Marriage is presented as a relationship of community which requires altruism. It provides the balance to a public

world of commerce which is ordered by selfishly inspired contracts.⁶⁷ This is a split which emerged strongly from Lawrence Stone's discussion of changes in marriage: his description of a move from marriage based on the commercial values of property to marriage based on affect.

The public/private distinction as employed by liberals also contributes to the dominance of a contrast between the public world of commercial contract and the natural private world of altruism. It identifies contract with selfishness and contrasts this with the altruism which is supposed to flourish within marriage.

Perhaps as a result of these influences contract is little used to regulate inter spousal relations, in particular, in terms of their property entitlements. Frequently there is no provision in relation to the property of the couple and their legal rights are, therefore, calculated in accordance with the individualistic principles of ordinary property law. Rather than deal with these continuing images and ideals of selfish market and altruistic family that direct our thinking about relations between individuals, the law is moving away from strict principles of separation and strict application of contract. Increasingly,

"judges and lawyers ... faced with practical problems arising from human relationships, have concluded that pure autonomy, extreme liberal freedom of contract, is often unjust and ought not to be pursued at the expense of all other values."⁶⁸

In the principles of the Family Law (Scotland) Act for awarding financial provision on divorce⁶⁹ and in the presumption in favour of equal ownership of household assets,⁷⁰ there are signs of recognition of the potential unfairness of "pure autonomy" and "extreme liberal freedom of contract." There is evidence in the legislation of a move towards a recompense based model for dealing with the financial and property relations of spouses. It seems that,

"it is departing from the individualistic, self-reliance stance of traditional law."⁷¹

In considering the property rights of spouses on divorce and their rights during marriage to household assets, the legislation demonstrates a break with the traditional individualistic contractual approach. Under the separate property system, the legal right to assets depends on who has purchased or acquired the goods. In the absence of any contractual agreement between spouses regulating ownership, the law ascribes ownership to the purchaser or the spouse who has otherwise acquired title to the goods. This system concentrates on the individual's legal rights and takes no notice of the relationship between the couple or of their expectations about ownership which may have been influenced by the nature of their relationship. On the strength of the community of the marriage relationship, or the dependency and support existing within it, the spouses may expect to have some security in assets that have been acquired and used in the course of the relationship. A system which

awards rights only on the basis of legally binding agreements will often fail to satisfy these expectations.

The principles for property sharing contained in the Family Law (Scotland) Act demonstrate, however, a willingness to look at the marriage relationship in order to satisfy reasonable expectations produced by it.⁷² Compensation can be given for undue reliance within the relationship or for benefits given. Thus there is increased security for those who have acted altruistically within marriage and have done so without a contractual base. The property owner may be liable to compensate the other spouse, not on the basis of a contractual agreement but on the strength of a benefit he has received. There are signs of a

"willingness to reduce ... the property rights of an owner, in order to give effect to a moral ideal, that another party who had benefited an owner ... be entitled to be paid for the value of that benefit."⁷³

The Family Law (Scotland) Act, therefore, suggests some legal recognition of the continuing tension between community (altruism) and individualism (selfishness) within the relationship of marriage. It avoids a questioning of the fundamental distinctions that influence perceptions of relations between individuals both in the commercial market and the family. Instead it moves away from the traditional approach of contract. It moves towards a more flexible, recompense based model of dealing with property rights. With the exception of the presumption in favour of equal

sharing of household assets during marriage,⁷⁴ it postpones consideration of property rights until divorce. This is in keeping with the move away from contract. Contractual rights arise on the giving of a promise whereas rights based on recompense arise only after the benefit-conferring action has been completed. Thus altruism can continue to be encouraged during the relationship with individual compensation postponed until its breakdown.

CONTINUING TENSION

Histories of change⁷⁵ may point towards increased emphasis on individualism and may indicate a clean break between individual and community. Consideration of specific points of intersection between marriage, law and property demonstrate that instead of a break there is a continuing tension. The common law system of community appeared to preclude the possibility of tension by denying the legal existence of one of the spouses. The system of separate property that followed gave supremacy to individual legal rights and took no account of this tension. Both systems have proved to be inadequate and can be criticised for their failure to recognise an inevitable tension. An insistence on either community or individualism hides the co-existence of elements of community and individualism within marriage and in relations between marriage, property and law.

To confine marriage within one side of this perceived split between community and individual gives rise to unfulfilled expectations. By defining marriage as a relationship of community, conflicting interests between individuals will be obscured and classified as deviant. By characterising marriage as individualistic, there will be no recognition of real interdependent relations. What is needed is not modification of either community or separate property systems but a recognition of the specific relations between marriage, property and law. Their interaction should be considered, free from the influence of pre - conceived ideals and splits.

NOTES

- 1 L.Stone, The Family, Sex and Marriage, p.223.
- 2 Blackstone, Commentaries on the Law of England, I.15.III.
- 3 Fraser, Husband and Wife, p.507.
- 4 "The best answer to the doctrine is, that it is not true." Fraser, op.cit., p.508.
- 5 For a fuller discussion of legal regulation of the property of husband and wife, see chapter 2.
- 6 D.Murray, The Property of Husband and Wife, p.8.
- 7 See discussion of Community to Separate in chapter 2.
- 8 Stair, I.4.9.
- 9 Fraser, op.cit., p.509.
- 10 ibid.
- 11 Conjugal Rights (Scotland) Amendment Act 1861.
- 12 Married Women's Property (Scotland) Act 1877.
- 13 L.Stone, op.cit., p.85.
- 14 ibid., p.86.
- 15 ibid., p.93.
- 16 ibid.
- 17 M.Anderson, "Insights from the History of the Family," in M.Anderson (ed.), Sociology of the Family, p.50.
- 18 L.Stone, op.cit., p.257.
- 19 ibid.
- 20 Or at least with the continued holding of large estates being restricted to a very small number of families.
- 21 For discussion of changes in terms of property and ownership, see chapter 4.
- 22 L.Stone, op.cit., p.268. There was, according to Stone, a change to a type of personality which had a higher capacity for warm emotional relations. I want to leave aside this notion of a personality change and concentrate on the greater emphasis given to the individual.
- 23 L.Stone, op.cit., p.236.
- 24 ibid., p.258.

25 M.A.Glendon, State, Law and Family, p.270.

26 There have been more recent modifications of the extreme system of separate property which came into being as a result of the reforms of the late 19th and early 20th centuries. Consideration of these modifications, later in this chapter, shows that to some extent they recognise and reflect the tension between community and individual to which Glendon refers.

27 L.Stone, op.cit., p.241. By the "common good" Stone meant the public good. As liberal individuals were to live together in society for their common good, so individuals within the family were to live together in the companionate marriage.

28 The suitability of the term contract in relation to marriage has been greatly disputed and debated. It was considered, among others, by Scottish juridical writers such as Stair, Erskine and Fraser. Although the debates about marriage and contract are wide ranging, I want to consider the use of contract in only one respect. I want to consider the extent to which the contractual model contributes to confusion over individual and community within marriage.

29 Erskine, Principles, I.6.2.

30 Fraser, Husband and Wife, p.155.

31 "Consensus, non coitus, facit matrimonium." Stair, I.4.6.

32 I.4.1.

33 Fraser, op.cit., p.155.

34 Fraser, at p.168, refers to Hegel's Philosophy of Right.

35 Stair, I.4.9.

36 M.A.Glendon, State, Law and Family, p.165.

37 The Second Sex, p.304.

38 Wives and Property, p.232.

39 D.Murray, The Property of Husband and Wife, p.90.

40 Stair, I.4.9.

41 1730 M. 5841.

42 D.Murray, op.cit., p.19.

43 Trustees of Murray v. Dalrymple, 1745 M. 5842.

- 44 The jus mariti could not be excluded by the wife on her own. Exclusion was possible by the husband, by a third party in a conveyance to the wife or by the wife with the consent of her husband.
- 45 E.M.Clive, Husband and Wife, p.354.
- 46 *ibid.*, p.355.
- 47 G.S.Alexander, "The Transformation of Trusts as a Legal Category," 1987, Vol.15, Law and History Review 303, at p.320.
- 48 An intrusion of the public into the private.
- 49 If the provision was alimentary in nature there was an implied exclusion of jus mariti and right of administration: Stair, I.4.9; Fraser, p.764.
- 50 D.Murray, The Property of Husband and Wife, p.88.
- 51 (1875) 2 R. 507.
- 52 D.Murray, *op.cit.*, p.94, 104; Fraser, Husband and Wife, p.768. An alimentary provision cannot be created in one's own favour.
- 53 The Scottish Law Commission, in their consideration of occupancy rights and domestic violence, spoke in terms of the wife as the non-entitled spouse. Increasingly homes are purchased in joint names and in many cases women are tenants of rented accommodation. In the past, however, it was usually the wife who was the non-entitled spouse and, in terms of domestic violence, it is almost always the woman who is the victim of abuse. I will, therefore, tend to refer to the wife as the non-entitled spouse although recognising that this is by no means always the case.
- 54 Scot. Law Com., Consultative Memorandum 41, Occupancy Rights in the Matrimonial Home and Domestic Violence, 1978, Vol.2, p.2.
- 55 Colquhoun v. Colquhoun (1804) Mor. App. "Husband and Wife" No.5.
- 56 1911 S.C. 200.
- 57 Scot. Law Com., Consultative Memorandum 41, p.5.
- 58 R.Unger, The Critical Legal Studies Movement, p.86.
- 59 *ibid.*, p.66.
- 60 Scot. Law Com., Consultative Memorandum 41, p.7.
- 61 s.4(2).
- 62 Scot. Law Com., Consultative Memorandum 41, p.19.

63 Scot. Law Com., Consultative Memorandum 57, Matrimonial Property, 1983, p.42.

64 Limited exceptions to the continuing principle of separation of property during marriage can be seen in s.2(6) which allows claims for aliment to be made while the couple continue to cohabit and s.25 which introduces the presumption of equal ownership of household assets.

65 See discussion of Marriage as a Contract, earlier in this chapter.

66 The effect of this contrast is considered by R.Unger, The Critical Legal Studies Movement, in relation to traditional contract theory.

67 It is C.Lasch's, Haven in a Heartless World, 1977, Basic Books, New York. ?

68 P.S.Atiyah, Essays on Contract, p.146.

69 s.9.

70 s.25.

71 *ibid.*, p.55.

72 s.9.

73 P.S.Atiyah, *op.cit.*, p.49.

74 s.25.

75 See Part I.

MARRIAGE, PROPERTY AND LAW: CONCLUSIONS

In the introduction to this thesis I set out my intentions and the pattern of study that I would follow. It was not, I said, a thesis "inspired by the desire to change or to solve." Its purpose was to explore relations between marriage, property and law. In my conclusion, therefore, there will be no solutions, no proposals for reform.

My interest in marriage focused, to a large extent, on ways of thinking about the relationship. I was interested in considering perceptions of marriage and its relations with property and law. These might be popular perceptions or perceptions reflected in legal rules. It has been argued that,

"ideas are a causal factor in the development of the conjugal family."¹

I wanted to consider some of the ideas which seem to inspire the marriage relationship and to analyse their influence in legal rules. If I hoped to produce reform it was in ways of thinking about marriage rather than primarily in legal regulation.

CONFUSED RELATIONS

I began with the proposition that there was confusion. There was confusion within marriage and its relations with

property and law. The interrelation, if indeed there was any, between these three elements had become obscured. My intention was to demonstrate this confusion, to seek to explain its development and in so doing to re-establish links between marriage, property and law.

For families of the past, property seemed to be an important factor in marriage. Economic considerations and questions of ownership influenced marriage patterns and legal regulation of property was an accepted element of marriage. There was a clear link between marriage and property in the feudal society where the,

"family was not perceived to be separate from the rest of economic life."²

Within this society, there seemed to be no split between marriage and property. They were recognised as being closely linked. Through later stages of society, property continued to be relevant to spouse selection and the formation of marriage, with its importance being reflected in the common law and in the use of marriage contracts.

This acceptance of property as an integral part of marriage contrasted with more modern perceptions of a split. Romantic notions of marriage reject property concerns and this split gives rise to a reluctance to consider the economics of a marriage relationship.

"Family ideology over the past 150 years has laid greater emphasis on the romantic and companionate ideal of marriage while disguising its fundamental economic ... aspects."³

Regulation by husband and wife of their property can be used to question the quality of their personal relationship. Practical links between marriage and property, however, are evident. There is, for example, an obvious link between marriage and the matrimonial home. The importance of property is often made clear in the bitter disputes which can accompany divorce. In discouraging husbands and wives to recognise the importance of their rights to property, and to regulate them accordingly, there seemed to be a false denial of links between marriage and property. An image of the marriage relationship appeared to mislead spouses into a misunderstanding of connections between marriage and property.

HISTORICAL CHANGE

The foundation of this thesis lay in tracing developments from a system which recognised a close link between marriage and property to one which obscured or denied any link. Beginning with these popular perceptions, it was my intention to search through historical studies of legal reform, of marriage and of property to discover what evidence there was to support them. In isolated histories of law, marriage and property I discovered presentations of change.

Legal Reform⁴

The changes in the legal rules governing the property of husband and wife could be stated briefly as being the abolition of the jus mariti and the husband's right of administration. These two rights which had previously brought all of the wife's property within the control, and to some extent ownership, of her husband were gradually modified and finally removed. In the wake of reform, Scotland was left with a system of separate property. It was a system by which marriage had no effect on the rights of ownership of husband and wife.⁵

These reforms, while specific in their nature, brought with them implications of change. They signalled a break with a system which had been characterised as one of community. They signalled a break with legal regulation of marriage. They also signalled a decrease in the importance of property as an element of marriage. They suggested a break between marriage and property.

Marriage⁶

Summarised conclusions, drawn from Lawrence Stone's historical account of changes within marriage, pointed towards a split between the personal relationship of marriage and property. The property centred family was replaced with the affective family. Increasing emphasis was focused on the companionate marriage, a relationship of

personal affective significance. This modern marriage was characterised by privacy and an emphasis on its individual members. The marriage unit, the nuclear family, was distinct from the network of wider kin; it was closed off in terms of physical space and it was inward looking and self centred. The relationship was inspired by individual desire and its success depended on individual affective relations. In terms of the marriage relationship there appeared to be three major trends: property to affect; openness to privacy, and community to individual.

Property⁷

The third history was one of property. I considered changes within property and, in particular, in terms of matrimonial property. Here too there were signs of change. There was a shifting balance between heritable and moveable property. Land became of reduced significance to the majority of families with an accompanying move from inheritance or marriage to earned income as the primary source of property acquisition. Changing rules of succession and of entail suggested a loosening of links between a specific family line and land. Growth in the importance of moveables and, in particular, money encouraged a view of property as the asset in itself rather than the earlier view of property as a right in something: usually a right in land. This changing vision of property, accompanied by the growing importance of earned income, placed emphasis on the individual nature of ownership. The individual's right to

the enjoyment of his labour was a strong influence in theories of property.

IMAGES OF CHANGE

In presenting these three histories there was a dual purpose. First, I wanted to provide some knowledge of concrete change in each of these three elements. Secondly, I wanted to use these histories to investigate my proposition that there was confusion with regard to relations between marriage, property and law. It was my suggestion that an image of marriage had developed which was influential in perception and regulation of the relationship.

From the histories of law and of marriage, there emerged a similar vision of marriage and its relation with property. There were several consistent characteristics. There was a split between marriage and property; a move towards privacy and an emphasis on the individual. It might be argued that law was responding to an image or an ideal of marriage. While the presence of these characteristics in legal terms was real - there was a move towards individualism and non-regulation - I was unconvinced about the emerging ideal of marriage.

In Part II, I set out to question the image that had emerged. I adopted two methods of questioning. The first was to consider what had been left out of the historical

accounts⁸ and the second was to engage in criticism of their historical method⁹.

"One strategy for attacking the illusion is to point to 'the facts' left out of the ideological representation."¹⁰

I suggested that what had been left out of the account of the legal reforms and of Stone's account of marriage was an historical consideration of property.

The legal reforms abolished the jus mariti and the right of administration. These were elements of a legal system devised in a society where land was the most important type of property. Various arguments can be made as to why they were finally removed but one obvious reason for their ultimate disappearance was a change in property. A growth in moveable property and the declining importance of land to most families questioned the continued relevance of the husband's rights. The old rules had become unsuitable partly because of changes in property and changes in relations between marriage and property. No positive attempt was made, however, to consider what new types of property there were, what new types of relations might exist between marriage and property and how these could be regulated. On the basis of the demise of one type of family property, there was a withdrawal of specialised legal regulation.

Similar criticisms can be made of Stone's account of change within marriage. He describes the demise of the property centred family. This was a family form wherein choices were governed by considerations of land and status. It was part of a social structure which was dependent on land and in which marriage was an important factor in land acquisition or transfer. Within this system marriage could bring benefits in property but it could also pose a threat and, therefore, it was reasonable for property and economic concerns to play an important role in the matchmaking process. Stone describes the decline of this system in terms of the lessening control of parents and kin over the choice of spouse. It provides, for him, a break between marriage and property. As property concerns exert less influence over mate selection thus he concentrates on personal choice and the growth of affect. He balances the property centred family against the affective family. The decreasing significance of land was the main factor in the demise of the property centred family. Stone fails to consider the emergence of new types of matrimonial property and thus suggests a definite split between marriage and property.

In both the legal reforms and Stone's account of marriage, there was a failure to deal with the third history - the history of property. The image of a split between marriage and property can be questioned by pointing to the facts that were left out. By reinserting aspects of change within

property it becomes clear that there continue to be relations between husband and wife and property.¹¹

Thus, by supplying the missing facts, one characteristic of the modern image of marriage is questioned. A growing emphasis on affect has not replaced property. Affective relations may be closely interlinked with physical property. While this characteristic may be questioned, it remains fully enshrined in the legal rules, which following abolition of the jus mariti and the husband's right of administration, recognised no link between marriage and property.

My second method of questioning the image of marriage was to engage in criticism of traditional methods of presenting family histories. There are frequent tendencies to conceive of the family as a universal form; to view it from the inside as a distinct unit and, in tracing its development, to fit it within one side of established dichotomies.

In the legal reforms there was an apparent tendency to prioritise the land owning family; to make the rules to suit the family which owned significant property and which made private arrangement for its regulation.¹² Similarly in Stone's account there is a tendency to prioritise the family of a particular social class: the property centred family of the land owning class or the companionate marriage of the middle class.¹³ The presentation of one

family form as The Family may create a misleadingly clear picture of change.

In historical accounts of the legal reforms, which took no notice of changes in property, and in changes within the marriage relationship there was a tendency to give rise to unjustified expectations. The legal reforms signalled a move towards non-regulation and towards individual equality; both of which were presented as benefits. The practical effects only become clear when these legal rules are inserted within economic and personal relations. In Stone's account, a family centred history presents a shift from an open family towards a closed and private nuclear unit and from a relationship influenced by the good of the community to a relationship which emphasised the individuals. They thus give undue emphasis to changes within the distinct unit of marriage without taking notice of its changing external relations.

The desire to discover deaths or splits within family existence forces relations to be compartmentalised. In both the legal reforms and Stone's historical account there is a tendency to divide relations between public and private and between community and individual. The retreat of legal regulation signals an increasing privatisation of marriage; an image which is amply supported in Stone's picture of the closed off, isolated, private nuclear unit. The removal of the jus mariti and right of administration are classified in terms of a move from a community property system to a

system of separate property which preserves individual rights. This shift is also evident in Stone's history in the declining control of community over marriage and the rise of individualism. In both histories, there is a tendency to portray marriage as fitting within one side of an opposing pair and in so doing to strengthen the existence of these splits.

By criticising these three aspects of traditional historical presentation, I highlighted the dominant characteristics that emerged from the histories of legal reform and marriage and questioned their validity. Having set up the argument that a move from property to affect; from public to private, and from community to individual were dominant characteristics of an image of marriage and having suggested that they contributed to a false image, I went on to consider these characteristics in terms of specific points of interaction of marriage, property and law.

REFLECTED IMAGES

What was the significance of the ideology of marriage? It was my intention to suggest that a false image of marriage and its relations with property might lead to unfulfilled expectations and to inequitable legal results. It might also restrict the vision of those within marriage and those who sought to regulate it. The characteristics which had emerged were reflected in the legal rules. They were also

present in terms of property. Within the relationship of marriage, however, their existence was to some extent an illusion.

"...the occupancy of a status ... may ... justify special expectations."¹⁴

The occupation of a status within marriage may give rise to expectations based on the ideology of marriage. An image of marriage as affective and private may give rise to expectations. The characteristics of this image may be present in economic terms and may also influence the legal rules.

In Part III, I considered aspects of relations between marriage, property and law which reflected the image of apparent splits between property and affect, public and private, and community and individual. This was not intended to be a comprehensive display of the effect of a family image on legal regulation. It was intended to be a collection of fragmented reflections. Thus, in concluding, I do not want to universalise or simplify aspects of that discussion. In considering the infiltration of an image of the marriage relationship into relations between marriage, property and law, there are, however, certain common strands.

PROGRESSIVE CHANGE

Within the image of marriage there was an implication of progress. Both the history of the legal reforms and the changes within marriage were presented in terms of straightforward improvement. The trends - property to affect; open to private, and community to individual - were presented in Stone's account as progress. In general legal terms, they were also presented as progressive. When we consider property changes and the interaction of all three elements, their beneficial nature is questioned.

A shift from property to affect as the focus of marriage, was presented by Stone as a benefit. The removal of the husband's rights to his wife's property ^{was} ~~were~~ also generally welcomed. Thus, the indication of a legal split between property and marriage was seen as a benefit. Neither accounts, however, looked at changes in property. They failed to consider new relations between marriage and property. Giving greater freedom to individuals to choose their own spouse and freeing wives from the inequalities of the common law system, clearly appeared to be beneficial. The progress lay, however, within the bounds of the specific circumstances. It might be argued that there is nothing inherently good in a split between property and affect. What is required is recognition of the relations that do exist. The presentation of a progressive split between property and affect effectively denied the continuing relations between property and marriage.

The move from openness to privacy was similarly presented by Stone as improvement. The autonomy granted to the spouses and the physical privacy of the nuclear family's domestic space may be welcomed as benefits for the family. Increased space for personal development and improved living conditions were welcomed. The move from enforced regulation of marriage to a system which allowed for private ordering may also be seen as progress. Allowing individuals to regulate their own affairs was seen as preferable to the enforced pattern of regulation which had operated at common law. Privacy, however, should not be hailed as inherently good. In both the legal reforms and Stone's account, the benefits of privacy were emphasised by comparison with the defects of the preceding system.

"Privacy itself is an empty concept, only when the private area has been ... found to be desirable, does it make sense to champion it."¹⁵

The questionable desirability of privacy, as it applies to marriage and relations between spouses and property, has been discussed in chapter 7. The potential threat of the private home becomes obvious in relation to domestic abuse. The benefits of privacy are doubted when it hides dependency and hierarchy.

For Stone and for the legal reforms, a switch from community to individualism was also presented as improvement. Stone emphasises individualism as signalling

progress from the previous enforcement of the common good. In so doing he takes little account of the benefits of community and obscures the community nature of the companionate marriage. With the removal of the husband's rights to his wife's property, the legal reforms reject a system of community. This is generally presented by the legal writers as a progressive reform. The defects of the community system of the common law, however, had more to do with inequality than with community. Individuality is therefore credited with a beneficial nature which it does not inherently possess.

INCONSISTENT TERMS

The characteristics which have been highlighted have different implications within each of the three elements of marriage, property and law. In the histories of legal reform, marriage and property similar characteristics emerge. Privacy and individualism figure in each of the three accounts. While the elements of law, marriage and property appear outwardly to have developed consistently with each other, on closer analysis, a potential for conflict can be shown.

For Stone, privacy means separation of the nuclear unit from the concerns of their wider family and from the prying eyes of the neighbourhood. Privacy means isolation within the matrimonial home and an emphasis on personal relations. In terms of property, privacy means an emphasis on the

individual's right to property; the right to use and abuse it free from public regulation. It can also mean the physical privacy of property and its personal domestic nature. In legal terms, privacy means non-intervention by law. It denotes a sphere of private autonomy where relations are ordered by private contract.

Individualism, similarly, may have different meanings in each of the elements. For Stone, individualism means an emphasis on individual choice, individual personality, individual desire and individual affective relations. In terms of property, individualism suggests a system which emphasises the selfish rights of the individual owner; the relationship between individual owner and asset. Individualism, in law, emphasises the supremacy of individual legal rights. It is characteristic of the liberal notion of individual legal autonomy.

Although the same words have emerged from each of the elements of law, marriage and property, it is misleading to assume that they have the same meanings. The implications of these terms can be different within each element. It is deceptively simple to see a progressive fit between marriage, property and law. Whereas there may be an outward appearance of consistency, there may in fact be discord. For Stone, for example, individualism within marriage entailed a partnership of different individuals. Within the companionate marriage, there was recognition of the different roles of husband and wife. Legal individualism,

however, takes no account of difference. This inconsistent understanding of individualism may produce unfair results.

DICHOTOMIES

The development of these characteristics has been portrayed in terms of dichotomies: property/affect; public/private, and community/individual. This method contributes to the vision of marriage as an isolated, closed compartment. Relations within marriage are constrained by the limits of these dichotomies. Thus the options of the spouses and the potential for reform are restricted. Fran Olsen has argued, in her discussion of the family and the market, that by dividing aspects of life into one or other side of an opposing pair, the options for change are limited.¹⁶ All that reform can do is to make either side more like itself or more like the other.

As discussed above, the characteristics of modern marriage were presented as benefits. Affect, privacy and individualism were portrayed as the good side of the dichotomies with property, public and community as the bad. Specific developments were thus fitted into a predefined system of divisions. This structure contributed to the creation of an ideal of marriage, constrained by the limits of these dichotomies. Discussion in chapters 7 and 8 has shown that marriage and its relations with property and law fit inconsistently within one or other side of the pair. A study of specific relations, specific points of

intersection, highlight the inadequacy of these dichotomies. By placing the marriage ideal within one compartment, a standard is set. Failure to remain within that compartment constitutes deviance. Rather than recognising the inadequacy of the structure, there is a tendency to highlight the failure of the individual.

There has been legal recognition, both under the common law system and under the modern system of separate property, of the inadequacy of a marriage ideal. Failure to conform with the dominant image has at times been recognised by modification of the legal rules.¹⁷ Modifications have been made, however, largely on the basis of the dysfunction of the rules and with relatively little consideration of the perceptions, the images, the ideology which surround marriage. The image of the romantic, affective relationship appears to be sustained by the denial of an underlying involvement with property. The result may be the perpetuation of a vulnerable relationship, open to the threat of emerging property dispute. A realisation of the image which surrounds marriage and its links with property and law might permit the development of better informed, realistic and more secure relations.

NOTES

- ¹ F.R.Elliot, The Family: Change or Continuity?, p.69.
- ² F.Olsen, "The Family and the Market: a Study of Ideology and Legal Reform" (1983) 96 Harvard Law Review 1497, at p.1516.
- ³ D.Gittins, The Family in Question, p.160.
- ⁴ See chapter 2.
- ⁵ Marriage continued to allow for regulation of property on death or divorce.
- ⁶ See chapter 3.
- ⁷ See chapter 4.
- ⁸ See chapter 5.
- ⁹ See chapter 6.
- ¹⁰ S.Staves, Married Women's Separate Property in England, 1660-1833, p.8.
- ¹¹ These links are to some extent closer in that the property of husband and wife is most frequently domestic property which is closely tied to the marriage relationship.
- ¹² See pp.180-181.
- ¹³ See pp.178-180.
- ¹⁴ R.M.Unger, The Critical Legal Studies Movement, p.61.
- ¹⁵ J.Montgomery, "Children as Property?" (1988) 51 M.L.R. 323, at p.332.
- ¹⁶ F.Olsen, op.cit.
- ¹⁷ For example, the use of marriage contracts, the Matrimonial Homes (Family Protection) (Scotland) Act 1981 and the Family Law (Scotland) Act 1985.

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